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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91200575
Party	Defendant Kenneth B. Wiesen
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE
TRADEMARK TRIAL AND APPEAL BOARD**

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HERSHEY CHOCOLATE & CONFECTIONERY
CORPORATION and THE HERSHEY COMPANY,

Opposers,

v

Opposition No.
91200575

KENNETH B. WIESEN,

Applicant.

Serial Nos.
85/221,585 & 85/210,942

-----X

MOTION TO COMPEL DISCLOSURE

1. Pursuant to Federal Rules of Civil Procedure 37(c), Applicant, Kenneth B. Wiesen, hereby moves to compel Opposers to respond to Applicant's Request for Production of Documents and Things and to respond to Applicant's Demand for Interrogatories.

INTRODUCTION

2. The issue in this opposition proceeding is simple and straight forward, Opposers claim common law use of the mark MILKSHAKE and Applicant claims that Opposers claimed common law use of the mark was nothing more than an identification of a flavor "milkshake" of Hershey's iconic candy bars KITKAT and WHOPPERS. The dispute regarding the discovery in this matter centers entirely upon Opposers refusal to provide Responses to Applicant's discovery focused on that central element.

BACKGROUND

3. Applicant filed an application for registration of the mark MILKSHAKE for "candy; candy bars; candy with caramel; candy with cocoa; chocolate candies" in International Class 30 on January 19th, 2011 and was assigned Application Serial No. 85/221,585. Notice of Publication was

dated June 14th, 2011. Applicant additionally filed an application for registration of the mark MILK SHAKE [separate words] for “candy, candy bars” in International Class 30 on January 5th, 2011 and was assigned the Application Serial No. 85/210,942. Notice of Publication was dated June 14th, 2011.

4. The filing of these marks was solely for the purpose of advancing Applicant’s business in resurrecting discontinued candies back to the market. In this instance, Applicant’s intent was to resurrect the iconic and longstanding candy bar named MilkShake, originally produced by Hollywood Brands in 1927. Hollywood was the owner of the first mark bearing registration no. 1273766, a copy of the specimen of the Milkshake candy bar is attached as Exhibit 1. Also attached as Exhibit 2 is a specimen of the mark filed by Registrant Leaf, Inc. on January 28th, 1991 registration no. 1669640. Both these specimens are images of a chocolate or compound coated nougat and caramel bar boldly identified and well known as the “Milkshake Malted Milk Bar,” also known as “Milkshake” which acquired a distinctiveness in the public and candy industry between the years 1927 (when it was first introduced) and continuously through the 1980's when the candy bar was discontinued.

ARGUMENT

5. Opposers filed the within opposition based upon the allegation that since 2005, it has created common law use of the mark MILKSHAKE in connection with its candy products KITKAT and WHOPPERS which predates Applicant’s filings. Opposers do not claim priority registration rights. Applicant takes the position that Opposers have no common law use of the mark in that the term, “milkshake” used on Opposers’ candy wrappers, KITKAT and WHOPPERS, was nothing more than a flavor identifier.

6. Applicant’s discovery has centered on obtaining proof from Opposers that the use of the word “milkshake” on the applicable KITKAT and WHOPPERS candies was in fact a flavor

identifier. In that regard, Applicant served Opposers with Amended First Set of Interrogatories [interrogatories amended based upon Opposers' objection to length of initial set of interrogatories].

8. Opposers served objections and responses to Applicant's Amended First Set of Interrogatories on April 13th, 2012 a copy of which is attached hereto as Exhibit 3. (*The Responses include Applicant's Demands.*)

9. Interrogatory #5 (*Exhibit 3*) went to the heart of the issue of "milkshake" as being a flavor identifier on the Opposers' candies and not commonlaw use of mark:

5. Identify each flavor ingredient and "identification certificate" [spec sheet] for each candy product listed in response to interrogatory #3, (include the identity of the company, supplier, manufacturer for each flavor).

10. Hershey's response to Interrogatory #5 reads:

Hershey objects to the extent that this interrogatory seeks information regarding the specific formulation or recipe of any Hershey candy products, on the grounds that such information is irrelevant and constitute trade secrets. Subject to and without waiver of the foregoing objection, Hershey's objection to definition U, and Hershey's general objections, Hershey refers Applicant to the documents Hershey will produce in response to the document requests.

11. On May 4th, 2012, Opposers served a CD which consisted of 706 documents (most of which were blank and marked privileged). The documents are not annexed hereto for economy purposes. A careful review of those documents, however, demonstrate that none of them identify the actual flavor ingredients, nor the "identification certificate" [spec sheet] from the flavor manufacturer.

12. Similarly, Interrogatory #8 sought documentation which would likely demonstrate Opposers' use milkshake flavoring in the candies in question:

Identify and describe all documents that include flavor rankings, testing, results, or preferences created and maintained or used by

Opposers in the development, maintenance and modification of the various “candy products” identified by Opposers in Response to interrogatory numbers 2 and 5.

13. Hershey’s response to Interrogatory #8 was:

Hershey objects to this Interrogatory as vague, ambiguous, overbroad, and unduly burdensome. Hershey further objects to this Interrogatory to the extent it seeks information or documents that are not relevant to the claims or defenses of any party or to the subject matter involved in this action, and not reasonably calculated to lead to the discovery of admissible evidence.

14. On the same line of discovery, Interrogatory #9 sought Opposers to identify the research and development that they utilized for the flavor and flavor profile on the candy products at issue:

Identify the marketing and art department and any outside agency, company or individual that created, assisted in, offered research, graphic design or art for the used for the graphics, labels and designs of each various “candy products” which was identified by Opposers in response to interrogatories 2 and 5, including but not limited to the use of the word “MilkShake” and the image of a milkshake drink depicted on the specimen submitted by Opposers in its application for Opposers Mark.

15. Opposers’ response to Interrogator #9 was as follows:

Hershey objects to the use of the phrase “internal flavor memoranda” as vague, ambiguous, overbroad, and unduly burdensome. Hershey further objects to this Interrogatory to the extent it seeks information or documents that are not relevant to the claims or defenses of any party or to the subject matter involved in this action, and not reasonably calculated to lead to the discovery of admissible evidence in this action. Subject to and without waiver of the foregoing objections, its Objection to Definition K, and its General Objections, Hershey refers Applicant to any responsible documents amongst those Hershey will produce in response to the Document requests.

16. Here again the 706 page CD Document exchange in no way were responsive to the interrogatories demanded.

17. In an attempt to resolve Opposers' failure to respond to these interrogatory demands which go to the central issue in this matter, Applicant sent various communications to Opposers' counsel asking them to reconsider their refusal to provide responses. Although there were a number of requests and a number of responses, they were all the same and a prime example of the response was in Opposers' Counsel's November 8th, 2012 communication page 2, paragraph 1 (*a copy of which is attached as Exhibit 4*) which stated:

Second, with respect to your objection to Hershey's responses to amended interrogatories numbers 5, 8, and 9 and document request number 24, as you acknowledged in both your July 6th, 2012 and October 26th, 2012 letters, the wrappers list the ingredients of each of the products bearing the MILKSHAKE mark. As we explained in our July 20th, 2012 letter, to the extent you seek specific and detailed formulations of the flavors used in the Milkshake-branded products, such information is not relevant to the issues in this proceeding: As set forth below, the relevant issue here is the meaning of the term MILKSHAKE to consumers, and there is absolutely no evidence in this proceeding that the technical formulation of Hershey's products has any bearing on the consumer understanding. Moreover, such formulations are trade secrets and Hershey is entitled to protect such formulation against disclosure, particularly to a potential competitor.

18. Interrogatories numbers 5, 8 and 9 do not seek the **wrapper** ingredients of the product (as Opposers' counsel claim above). Rather, the Interrogatories seek identification of documents which would have a bearing on the issue of whether the word "Milkshake" on the KIT KAT and WHOPPERS wrappers were an identification of the flavor of the product. Nor was Applicant seeking "trade secrets" as alleged by Opposers counsel. We were not seeking the methodology of creating the candy. We were not seeking the formulation for the candy. We were not seeking the amount of the ingredients. We were not seeking the procedure of manufacturing the product. These "trade secret" claims were raised solely to frustrate

disclosure of key discovery. The interrogatories simply sought those documents which are created and maintained as routine practice for any candy manufacturer developing and producing a candy (as flavor of any candy is a key factor).

19. By way of background, the KITKAT and WHOPPER products come in various flavors. It is Applicant's position that "milkshake" was just one of those many flavors. Attached as Exhibit 5 (*Pages 89-92 of Applicant's Response to Opposers' First Set of Request for Production of Documents and Things*) are images of those candy products. Hershey's own internal documents also explain that this line of discovery was not a fishing expedition. Bate stamped numbers 498 through 500 produced by Hershey as part of the 706 page production response clearly demonstrate this point, (*attached hereto as Exhibit 6*). Bate stamped number 500 states in part:

Milkshake 4F Kit Kat - These are samples for a 2006 Limited Edition opportunity. Current milk chocolate with added milk shake flavor, (kind of a malted milk flavor common in the states).

Bate stamped number 498 states in part:

Kit Kat Milkshake... The malt flavor addition to this, although not one of my personal favorites, is replicating McDonalds Malt Milk shake and our Whoppers flavor.

Bate stamped number 499 likewise states:

Milk 4F Kit Kat...This product was not as good as the other two. The malted milk flavour we feel is interesting as a concept but on the samples you submitted we detected a dairy off flavour which lingered after the bar had been eaten.

20. Along the same lines, Applicant's First Set of Requests for Production of Documents and Things, sought disclosure for this targeted area of discovery. (*Opposers'*

Responses which contain Applicant's demands is attached hereto as Exhibit 7.) For example,

Demand #24 sought:

Copies of all documents listing the flavoring and flavor characteristics and flavor ingredients in the "various candy products" included but not limited to Whopper and KitKat products.

21. Opposers' response to Document Request #24:

Subject to and without waiver of its objections to Applicant's Definitions and its General Objections, Hershey will produce documents sufficient to show the ingredients of products bearing Hershey's milkshake mark since January 1, 2005.

22. The documents ultimately identified by Hershey were simply ingredients listed on the wrappers and were in no way responsive to this Document Request nor this line of inquiry.

22. Similarly, Document Request #27 called for:

Copies of all documents which discuss and/or make reference to focus or sampling groups and testing for the development of the flavors, characteristics and tasting of the various candy products including but not limited to the Whopper and KitKat products.

23. Hershey's response to Document Request #27 was:

Hershey objects to this request to the extent that it is vague, ambiguous, overbroad, unduly burdensome, and to the extent it is duplicative of Document Request Nos. 23 and 25. Subject to the foregoing objections, its Objections to Applicant's Definitions, and its General Objections, Hershey refers Applicant to Hershey's Responses to Document Request Nos. 23 and 25.

Document Request Nos. 23 and 25 were not duplicative of this demand and responses to those demands were not responsive to this specific demand.

24. Similarly, once documents were produced by Opposers, Applicant sought additional documents through Applicant's Second Set of Requests for Production of Documents and Things
(Attached as Exhibit 8 is Opposers' Objections and Responses to Applicant's Second Set of

Requests for Production of Documents and Things which contains both Applicant's requests and Opposers' responses). Document request #2 sought:

Product labeling and specific identification of the natural and artificial flavoring contained in the Kit Kat Chocolate Milkshake as referenced in Hershey 0525 and 0527.

Hershey 0525 and 0527 are attached hereto as Exhibit 9. Both of these documents are internal memoranda from Opposers which talk about the ingredient statement for the KitKat chocolate milkshake. In the ingredient statement (which is a general statement of the ingredients used for labeling for consumers and not an identification of the actual flavor ingredients) the words "natural and artificial flavoring" are noted. Applicant's Demands sought specific identification of those natural and artificial flavoring. Hershey's response which was long winded stated in part that it objected to the demand as overbroad and unduly burdensome that it was irrelevant and constituted trade secrets and that it would only make available samples of its candy bars at its offices (which is entirely irrelevant to the demand.) A copy the actual response was previously attached hereto as Exhibit 8.

25. Similarly, Demand #5 sought documents which evaluate, discuss and make reference to the "malt flavor addition" for the KitKat milkshake as reference in Hershey's 0498, *(a copy of 0498 was previously attached as Exhibit 8.)* Hershey's response was similar to its response to Demand #2 and Opposers refused to provide this information. A copy of this response was previously attached hereto as Exhibit 8.

26. Similarly, Demand #13 sought:

All documents which evaluate, discuss and/or make reference to the consideration and/or concept testing of the flavors vanilla milkshake and orange creme milkshake as referenced in Hershey 0628. State if there are more than fifty (50) documents. Applicant requests the first fifty (50) documents that are closes in date to Hershey 0628.

Hershey's response to this Demand was that the demand was vague, ambiguous, compound, overbroad and unduly burdensome (see Exhibit 8).

27. Similarly, Demand #16 sought:

All documents which evaluate, discuss and/or make reference to the findings and to the flavor evaluations, including Milkshake (as referenced in Hershey 0647). State if there are more than fifty (50) documents. Applicant requests the first fifty (50) documents that are closest in date to Hershey 0647.

Hershey's response to this Demand was that the demand was vague, ambiguous, compound, overbroad and unduly burdensome and refused to provide the documents. (See Exhibit 8)

28, Lastly, Demand #21 sought:

Provide copies of all communications, graphics and documents form and to American Color Packaging which discusses, evaluates or makes reference to the terms and graphics "KitKat Milkshake," "Whoppers Milkshake vanilla," "Whoppers Milkshake orange creme," "Whoppers Milkshake strawberry," "Whoppers Robin Eggs Milkshake strawberry." State if there are more than fifty (50) documents. Applicant requests the first fifty (50) documents that are closest in date to October 2012.

This Demand was focused on the actual creation of the marks in relationship to the wrappers in question. Communications from the company creating these graphics would likely demonstrate, offer information regarding whether or not the term "milkshake" was used in reference to a flavor. Opposers refused to provide a response to this Demand.

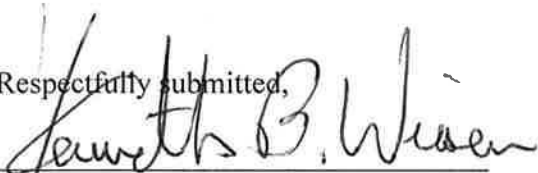
CONCLUSION

29. All the Interrogatories and Demands for Documents sought here are focused on what Applicant beleives to be the central issue in this case. Applicant should be permitted access to this disclosure to conduct its discovery free from Opposers' road blocks.

WHEREFORE, it is respectfully requested that the Trial and Appeals Board issue an Order to compel Opposers to respond to Applicant's Request for Production of Documents and Things and to respond to Applicant's Demand for Interrogatories.

Dated: January 11, 2013

Respectfully submitted,



KENNETH B. WIESEN, *Applicant*


CERTIFICATE OF SERVICE

The undersigned hereby certifies that she caused the foregoing APPLICANT'S' MOTION TO COMPEL to be served this 11th day of January, 2013, by U.S. first class mail, postage prepaid, and email upon the following correspondent of record for Applicant:

Paul C. Llewellyn
KAYE SCHOLER, LLP
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New York, NY 10022
(212) 836-8000

John P. Rynkiewicz
KAYE SCHOLER, LLP
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Washington, DC 20005

Attorneys for Opposers


KENNETH B. WIESEN



HOLLYWOOD BRAND INC. CENTRAL UT 82001 USA
A CONSOLIDATED FOOD COMPANY RESPONSIVE TO CONSUMER NEED

STAR MILK SHAKE HOLLYWOOD REC. U.S. PAT. OFF. MADE IN U.S.A. & IMPORTED U.S.A.

Nougat & Caramel

MilkShake

14%
Bigger
Bar

Nougat & Caramel

MilkShake

Hollywood

NET WT 2.0 OZ 56g

MilkShake

Nougat & Caramel

INGREDIENTS: SUGAR, CORN SYRUP, VEGETABLE OILS (PALM KERNEL, PARTIALLY HYDROGENATED SOY BEAN, AND HYDROGENATED PALM OILS), SKIM MILK SOLIDS, COCOA POWDER, WHEY SOLIDS, SALT, EGG ALBUMEN, VEGETABLE LECITHIN, VEGETABLE PROTEIN, ARTIFICIAL FLAVORS, MONO AND GLYCERIDES



NUTRITION INFORMATION PER SERVING

THIS BAR EQUALS
ONE SERVING

CALORIES 250
PROTEIN 2 GRAMS
CARBOHYDRATES 43 GRAMS
FAT 8 GRAMS

PERCENTAGE OF U.S.
RECOMMENDED
DAILY ALLOWANCES (U.S. *RDA)

PROTEIN 4 RIBOFLAVIN 6
VITAMIN A 1 NIACIN 1
VITAMIN C 1 CALCIUM 4
THIAMINE 4 IRON 4

*CONTAINS LESS THAN 2 PERCENT
U.S. RDA OF THESE NUTRIENTS

MALTED MILK BAR

MilkShake™

MilkShake™

MALTED MILK BAR

NET WT. 1.85 OZ. (52g)

MilkShake™ MALTED MILK BAR



Ingredients: Sugar, corn syrup, vegetable oil (palm kernel, partially hydrogenated soybean, and hydrogenated palm oil), skim milk solids, cocoa, malted milk, salt, sorbitol monostearate, egg albumen, lecithin, soy protein, artificial flavors, mono and diglycerides.



LEAF INC. BANNOCKBURN, IL 60015 U.S.A.

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

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HERSHEY CHOCOLATE & CONFECTIONERY CORPORATION and THE HERSHEY COMPANY,	:	
	:	
Opposers,	:	Opposition No. 91200575
	:	
v.	:	Serial Nos.
	:	85/221,585 & 85/210,942
KENNETH B. WIESEN,	:	
	:	
Applicant.	:	
	:	
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**OPPOSERS' OBJECTIONS AND RESPONSES TO
APPLICANT'S AMENDED FIRST SET OF INTERROGATORIES**

Opposers Hershey Chocolate & Confectionery Corporation ("HC&CC") and The Hershey Company ("Hershey Company," and, together with HC&CC, "Hershey"), by their attorneys, Kaye Scholer LLP, hereby submit the following objections and responses to Applicant Kenneth B. Wiesen's ("Applicant") Amended First Set of Interrogatories, served by U.S. first class mail on March 9, 2012 ("Interrogatories," and each an "Interrogatory"). Hershey reserves the right to supplement these responses in accordance with the Federal Rules of Civil Procedure.

GENERAL OBJECTIONS

Hershey objects generally to the Interrogatories set forth below (the "General Objections"). Each of the responses that follows is made subject to the General Objections. Hershey also will assert specific objections to each Interrogatory as appropriate. To the extent that Hershey responds to Interrogatories to which it objects, such objections are not waived and are expressly reserved.

A. Hershey objects to these Interrogatories to the extent that they seek responses or information protected by the attorney-client privilege, attorney work product, or any other applicable privileges or immunities, or seeks information otherwise protected from disclosure. The inadvertent disclosure of any information subject to such privileges or immunities is not intended to relinquish any privilege or immunity, and shall not constitute a waiver of any applicable privilege or immunity.

B. Hershey objects to these Interrogatories to the extent they seek any confidential research, commercial, customer, or proprietary information or information that Hershey received in confidence and/or is obligated to treat confidentially. Subject to and without waiving said objection, Hershey will provide responsive information subject to the Trademark Trial and Appeal Board's Standardized Protective Agreement as executed by the parties to this Opposition.

C. Hershey objects to these Interrogatories to the extent that they seek the disclosure of documents and/or information not in Hershey's possession, custody, or control.

D. Hershey objects to the Instructions to the extent that they seek to impose obligations beyond those required by the Federal Rules of Civil Procedure, the Code of Federal Regulations, and the Trademark Manual of Board Procedure, or any other applicable rules.

E. Hershey objects to these Interrogatories to the extent that they are vague, ambiguous, argumentative, overbroad, unduly burdensome, unreasonably duplicative, and oppressive, or seek information or documents that are not relevant to the claims or defenses of any party or to the subject matter involved in this action, and not reasonably calculated to lead to the discovery of admissible evidence in this action.

F. Hershey objects to these Interrogatories to the extent that they seek information that is publicly available and therefore would impose no greater burden for Applicant to obtain than for Hershey to provide, and/or are already known to Applicant.

G. Hershey's responses will be made according to its best understanding of the terms used in the Interrogatories and subject to reasonable inquiry into the relevant facts within the time allowed for responding to the Interrogatories.

H. Hershey reserves the right to correct, amend, modify, or supplement its responses from time to time and at any time in the future, as warranted by the circumstances.

I. Hershey objects to these Interrogatories to the extent they seek responsive information concerning Hershey's activities outside the United States because such information is irrelevant, does not relate to commerce in the United States, and is not likely to lead to the discovery of admissible evidence.

J. Hershey objects to these Interrogatories to the extent that they seek discovery of electronically stored information that is not reasonably accessible because of undue burden or cost.

K. Hershey objects to these Interrogatories to the extent they demand a search of all documents in the files of every Hershey employee. Hershey will conduct a search for information in the files of those reasonably likely to have responsive information.

OBJECTIONS TO DEFINITIONS AND INSTRUCTIONS

Definition K:

The term "candy product" and "various candy products" collectively mean all products which Hershey is alleged to have used in connection with the trademark MILKSHAKE as alleged by Hershey in its Notice of Opposition paragraph 2 and paragraph 5, including but not limited to the specimen submitted by Opposer in its application for Opposers' mark.

Objection to Definition K:

Hershey objects to this definition to the extent it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Hershey will provide responsive information concerning the use of Hershey's MILKSHAKE mark in connection with the uses asserted in Hershey's Notice of Opposition for the period between January 1, 2005 and February 1, 2012.

Definition O:

The term "KitKat" means one of the "candy products" identified by Hershey in its Notice of Opposition paragraph 2 and /or the specimen submitted with Opposers Mark.

Objection to Definition O:

Hershey objects to this definition to the extent it requires the disclosure of documents and/or information not in Hershey's possession, custody, or control, and to the extent it seeks to impose obligations beyond those required by the Federal Rules of Civil Procedure, the Code of Federal Regulations, or any other applicable rules. Hershey further objects to this definition to the extent it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Hershey will limit its responses to KitKat products bearing the MILKSHAKE mark.

Definition P:

The term "Whoppers" means one of the "candy products" identified by Hershey in its Notice of Opposition paragraph 2 and /or the specimen submitted with Opposers Mark.

Objection to Definition P:

Hershey objects to this definition to the extent it requires the disclosure of documents and/or information not in Hershey's possession, custody, or control, and to the extent it seeks to impose obligations beyond those required by the Federal Rules of Civil Procedure, the Code of Federal Regulations, or any other applicable rules. Hershey further objects to this definition to

the extent it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Hershey will limit its responses to Whoppers products bearing the MILKSHAKE mark.

Definition U:

The term “identification certificate” means the document which reveals the product specifications for the flavoring for each candy product.

Objection to Definition U:

Hershey objects to this Definition as vague, ambiguous, overbroad, and unduly burdensome. Hershey further objects to this Definition to the extent it seeks the production of documents containing trade secrets, and seeks information or documents that are not relevant to the claims or defenses of any party or to the subject matter involved in this action, and not reasonably calculated to lead to the discovery of admissible evidence in this action

OBJECTIONS TO INTERROGATORIES

Interrogatory No. 1:

Identify each person, whether or not currently affiliated with you, who participated in or provided information for answering and/or responding to these interrogatories.

Response to Interrogatory No. 1:

Hershey objects to the use of the phrase “participated in” as vague, ambiguous, and overbroad. Subject to and without waiver of the foregoing objections and its General Objections, Hershey identifies the following individuals as principally responsible for providing information responsive to these interrogatories:

Lois B. Duquette, Esq.

Craig Kinderwater

Lisa Kronmuller

Interrogatory No. 2:

Identify each person, whether or not currently affiliated with you, who participated in or has knowledge concerning the conception, creation, selection, adoption, design, approval, or clearance of the Applicant's Marks or any similar mark, including any formal or informal trademark searches, investigations, and/or opinions or counsel concerning the Applicant's Marks.

Response to Interrogatory No. 2:

Hershey objects to the use of the phrase "participated in or has knowledge" as vague, ambiguous, and overbroad. Hershey also objects to this Interrogatory to the extent it seeks the disclosure of information regarding the origin of *Applicant's* Marks rather than Hershey's marks. Subject to and without waiver of the foregoing objections and its General Objections, Hershey identifies the following individuals as principally knowledgeable concerning the conception, creation, selection, adoption, design, approval, or clearance of Hershey's MILKSHAKE mark as alleged by Hershey in its Notice of Opposition:

Lois B. Duquette, Esq.

Craig Kinderwater

Lisa Kronmuller

Hershey further states that its MILKSHAKE mark was originally used by Hershey's predecessors-in-interest commencing in or about 1982, and, accordingly, was original conceived, created, and selected by persons then living who are not currently affiliated with Hershey and whose identity is currently unknown.

Interrogatory No. 3:

Identify all "candy products" as set forth by Opposers in its Notice of Opposition paragraph 2 and 5.

- a. Identify the first date of alleged use of the trademark MILKSHAKE on each such "candy product" and if such "candy product" was in commerce on 1/19/11; and if Hershey's use for each such "candy product" in commerce in the United States

has not been continuous since the first use, indicate the specific dates of continuous use for each such candy product.

- b. Identify the wrapper, label, display box or other point of sale packaging for each "candy product."

Response to Interrogatory No. 3:

Subject to and without waiver of its General Objections and its Objection to Definition K, Hershey states that MILKSHAKE was used on a KIT KAT product starting on or about December 2005, for a period of at least one year, and has been used continuously on a WHOPPERS product since in or about the summer of 2005. Hershey further refers Applicant to the documents Hershey will produce in response to Applicant's First Set of Requests for Production of Documents and Things (the "Document Requests").

Interrogatory No. 4:

Separately identify each "promotion and advertising" for each "candy product" identified in response to Interrogatory number 3 and all other marketing, sales and product brochures, price lists, supply sheets, sell sheets, marketing catalogs, parts and specification sheets and any other sales and advertising documents which specifically has the term "MilkShake" contained therein.

Response to Interrogatory No. 4:

Hershey objects to this Interrogatory as overbroad and unduly burdensome. Subject to and without waiver of the foregoing objections, its General Objections, and its Objection to Definition K, Hershey refers Applicant to the documents Hershey will produce in response to the Document Requests.

Interrogatory No. 5:

Identify each flavor ingredient and "identification certificate" for each candy product listed in response to interrogatory number 3, (include the identify of the company, supplier and manufacturer for each flavor).

Response to Interrogatory No. 5:

Hershey objects to the extent that this Interrogatory seeks information regarding the specific formulation or recipe of any Hershey candy products, on the grounds that such information is irrelevant and constitutes trade secrets. Subject to and without waiver of the foregoing objection, Hershey's Objection to Definition U, and Hershey's General Objections, Hershey refers Applicant to the documents Hershey will produce in response to the Document Requests.

Interrogatory No. 6:

Identify all flavors of the KitKat and whopper candies and all "candy products" in commerce in the United States since 1995 and to present and those that were specifically offered for sale in the United States on 1/19/2011.

Response to Interrogatory No. 6:

Hershey objects to this Interrogatory as overbroad and unduly burdensome. Hershey further objects to this Interrogatory to the extent it seeks information or documents that are not relevant to the claims or defenses of any party or to the subject matter involved in this action, and not reasonably calculated to lead to the discovery of admissible evidence in this action. Notwithstanding the foregoing, Hershey responds that, since 2005, its KIT KAT and WHOPPERS candies have included at least the following flavors:

KIT KAT: Milk Chocolate, Dark, White, Extra Crispy, Strawberry.

WHOPPERS: Milk Chocolate Malted Milk Balls, Peanut Butter Malted Milk Balls, Strawberry Malted Milk Balls.

All of the foregoing, except for Kit Kat Strawberry, were offered for sale in the United States on January 19, 2011.

Hershey further refers Applicant to the documents Hershey will produce in response to the Document Requests.

Interrogatory No. 7:

Separately identify any other trademark(s) other than Milkshake used in connection with the various “candy products” identified by Opposers in response to interrogatory number 3.

Response to Interrogatory No. 7:

Subject to Hershey’s Objection to Definition K and its General Objections, the trademarks, other than Hershey’s MILKSHAKE mark, that are used in connection with products bearing Hershey’s MILKSHAKE mark include, without limitation, the following trademarks:

WHOPPERS,

KIT KAT,

ROBIN EGGS,

HERSHEY’S, and

various trade dress and product configuration designs.

Interrogatory No. 8:

Identify and describe all documents that include flavor rankings, testing, results, or preferences created and/or maintained and/or used by Opposers in the development, maintenance and/or modification of the various “candy products” identified by Opposers in Response to interrogatory number 3.

Response to Interrogatory No. 8:

Hershey objects to this Interrogatory as vague, ambiguous, overbroad, and unduly burdensome. Hershey further objects to this Interrogatory to the extent it seeks information or documents that are not relevant to the claims or defenses of any party or to the subject matter involved in this action, and not reasonably calculated to lead to the discovery of admissible evidence in this action.

Interrogatory No. 9:

Identify all internal flavor memoranda for the research, development and modification of the flavor or flavor profile of each various “candy product” and all documents which list all

flavors of the various “candy products” which were identified by Opposers in response to interrogatory 3, including but not limited to the specimen submitted in the Opposers’ Mark.

Response to Interrogatory No. 9:

Hershey objects to the use of the phrase “internal flavor memoranda” as vague, ambiguous, overbroad, and unduly burdensome. Hershey further objects to this Interrogatory to the extent it seeks information or documents that are not relevant to the claims or defenses of any party or to the subject matter involved in this action, and not reasonably calculated to lead to the discovery of admissible evidence in this action. Subject to and without waiver of the foregoing objections, its Objection to Definition K, and its General Objections, Hershey refers Applicant to any responsive documents amongst those Hershey will produce in response to the Document Requests.

Interrogatory No. 10:

Identify the marketing and art department and any outside agency, company or individual that created, assisted in, offered research, graphic design or art for the used for the graphics, labels and designs of each various “candy products” which was identified by Opposers in response to interrogatory 3, including but not limited to the use of the word “MilkShake” and the image of a milkshake drink depicted on the specimen submitted by Opposers in its application for Opposers’ Mark.

Response to Interrogatory No. 10:

Hershey objects to this Interrogatory to the extent it seeks information or documents that are not relevant to the claims or defenses of any party or to the subject matter involved in this action, and not reasonably calculated to lead to the discovery of admissible evidence in this action. Subject to and without waiver of the foregoing objections, its Objection to Definition K, and its General Objections, Hershey responds that American Color Packaging assisted Hershey in the creation of the graphics referred to in the Interrogatory.

Interrogatory No. 11:

Identify all marketing, sales, product brochures, price lists, supply sheets, sell sheets, marketing pamphlets and catalogs, parts and specification sheets, any other sales and advertising documents to the trade (including but not limited to sales and promotional brochures and catalogues offered at confectionary and food shows attended by Opposers and for distributors, brokers, chains, retailers) for the various “candy products” which were identified by Opposers in response to interrogatory 3, including but not limited to the specimen submitted in the Opposers’ Mark.

Response to Interrogatory No. 11:

Hershey objects to this Interrogatory as overbroad and unduly burdensome. Subject to and without waiver of the foregoing objections, its Objection to Definition K, and its General Objections, Hershey refers Applicant to the documents Hershey will produce in response to the Document Requests.

Interrogatory No. 12:

Identify all candies and other products sold or offered by Hershey’s in the United States that bore the term “MilkShake” on its label, display, wrapping or other point of sale display since 1991.

Response to Interrogatory No. 12:

Hershey objects to this Interrogatory as overbroad and unduly burdensome. Hershey further objects to this Interrogatory to the extent it seeks information or documents that are not relevant to the claims or defenses of any party or to the subject matter involved in this action, and not reasonably calculated to lead to the discovery of admissible evidence in this action. Subject to and without waiver of the foregoing objections and its General Objections, Hershey identifies the following products as bearing Hershey’s MILKSHAKE mark in the United States since January 1, 2005:

Kit Kat Milkshake

Whoppers Milkshake Vanilla

Whoppers Milkshake Orange Crème

Whoppers Milkshake Strawberry

Robin Eggs Milkshake Strawberry

Interrogatory No. 13:

Does the Whopper “product wrapper or box” referred to in Hershey’s Notice of Opposition paragraphs 2 and 5 and/or submitted as a specimen for Opposers’ Marks depict an image of a strawberry “milkshake drink” (as referred to in the definitions section), and, if so, indicate the reasoning behind including such “milkshake drink” image on the “product wrapper or box.”

Response to Interrogatory No. 13:

Subject to and without waiver of its General Objections, Hershey responds that the package referred to in the Interrogatory plainly depicts an image of a milkshake beverage, which is used on the package to reinforce the MILKSHAKE name.

Interrogatory No. 14:

Identify and describe each document, including consumer responses, web references, web internet blogs, industry articles, industry reviews, consumer articles, magazines or newspapers reference and any other documents which demonstrates or supports Hershey’s claim contained in paragraph 3 of the Notice of Opposition that “the MilkShake trademark has become associated in the minds of the consumers with Hershey products” and/or that “the Hershey trademark serves as a symbol for Hershey products” and “the MILKSHAKE trademark has become associated in the minds of consumers with Hershey’s products”.

Response to Interrogatory No. 14:

Hershey objects to this Interrogatory as overbroad and unduly burdensome. Subject to and without waiver of the foregoing objections and its General Objections, Hershey refers Applicant to the documents Hershey will produce in response to the Document Requests.

Interrogatory No. 15:

Identify all past and current packaging advertisements and other promotional marketing or sales material containing the Opposers’ mark, and/or the term “MilkShake” whether alone or in conjunction with other words or mark, intended for use or potentially for use in the United States, including, without limitations, all print advertisements, web sites, online or digital advertising, social media presence (e.g. Facebook page, Twitter account, YouTube videos, online gaming, blogs), catalogs, brochures, pamphlets, marketing materials or documents, informational literature, press releases, price lists, stationery, business cards, radio advertisements and scripts

therefor, television commercials and scripts and storyboards therefor, and online video or audio materials and scripts therefor.

Response to Interrogatory No. 15:

Hershey objects to this Interrogatory as overbroad and unduly burdensome. Subject to and without waiver of the foregoing objections and its General Objections, Hershey refers Applicant to the documents Hershey will produce in response to the Document Requests.

Interrogatory No. 16:

Identify all documents concerning, reflecting or purporting to support any assertion by Hershey that Hershey's mark was not descriptive, was enforceable and/or protected and/or was not used to relate to the consumers the taste, flavor and/or characteristic of the "various candy products" including, but not limited to the specimen submitted with Opposers' Mark.

Response to Interrogatory No. 16:

Hershey objects to this Interrogatory as overbroad, unduly burdensome, and calling for legal analysis and conclusions. Subject to and without waiver of the foregoing objections, its Objection to Definition K, and its General Objections, Hershey refers Applicant to the documents Hershey will produce in response to the Document Requests.

Interrogatory No. 17:

Identify all documents which contain information, discussion, and notification about the development of the wrappers, displays, and labels for the "various candy products" including all documents which contain information, discussion and notification about the benefit or reasoning behind incorporating the term MilkShake on the label, wrappers or displays for the "various candy products" including, but not limited to the specimen product submitted with Opposers' Mark.

Response to Interrogatory No. 17:

Hershey objects to this Interrogatory as overbroad and unduly burdensome. Subject to and without waiver of the foregoing objections, its Objection to Definition K, and its General Objections, Hershey refers Applicant to the documents Hershey will produce in response to the Document Requests.

Interrogatory No. 18:

Identify all documents which identify any “various candy products” as “MilkShake.”

Response to Interrogatory No. 18:

Hershey objects to this Interrogatory as vague, ambiguous, overbroad, and unduly burdensome. Subject to and without waiver of the foregoing objections and its General Objections, Hershey refers Applicant to the documents Hershey will produce in response to the Document Requests.

Interrogatory No. 19:

Identify all Hershey products other than the “various candy products” which Hershey has used the word “MilkShake” on its label, wrapper, box or “point of display” since 1991.

Response to Interrogatory No. 19:

Hershey objects to this Interrogatory as overbroad and unduly burdensome. Hershey further objects to this Interrogatory to the extent it seeks information or documents that are not relevant to the claims or defenses of any party or to the subject matter involved in this action, and not reasonably calculated to lead to the discovery of admissible evidence in this action. Subject to and without waiver of the foregoing objections, its Objection to Definition K, and its General Objections, Hershey states that during a time period in the past, Hershey and its predecessors-in-interest produced a malted milk chocolate candy bar under the MILKSHAKE mark, and that Hershey has at various times used the word “milkshake” to refer to milkshake-type beverage products. Hershey further refers Applicant to the documents Hershey will produce in response to the Document Requests.

Interrogatory No. 20:

Identify all letters of objection and claims of violations issued by Hershey or its representatives for any instances where Opposers claim any party other than Applicant(Wiesen) has improperly used or intended to improperly use Opposers’ Mark, Milkshake.

Response to Interrogatory No. 20:

Subject to and without waiver of its General Objections, Hershey refers Applicant to the documents Hershey will produce in response to the Document Requests to the extent there are any that are responsive to this Interrogatory.

Interrogatory No. 21:

Identify all Hershey products which the word MILKSHAKE is listed on the label, wrapper, display box or point of sale display that is used as a descriptive word to identify a characteristic, taste and/or flavor of the product.

Response to Interrogatory No. 21:

Hershey objects to this Interrogatory as vague, ambiguous, overbroad, unduly burdensome, and calling for a legal conclusion. Subject to and without waiver of the foregoing objections and its General Objections, Hershey refers to its Response to Interrogatory No. 19 regarding the use of the term “milkshake” in connection with milkshake-like beverage products.

Interrogatory No. 22:

Identify all documents which support Hershey’s contention of “the mark’s inherently distinctive nature” as alleged by Opposers in its Notice of opposition paragraph 3.

Response to Interrogatory No. 22:

Subject to and without waiver of its General Objections, Hershey refers Applicant to the documents Hershey will produce in response to the Document Requests.

Interrogatory No. 23:

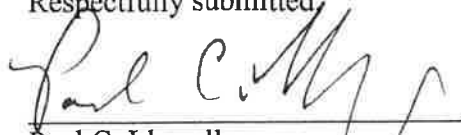
Identify each promotion and advertising as set forth by Hershey in Opposers Notice of opposition paragraph 3 which states in part, “in long use, promotion and advertising under Hershey’s MILKSHAKE trademark.”

Response to Interrogatory No. 23:

Subject to and without waiver of its General Objections, Hershey refers Applicant to the documents Hershey will produce in response to the Document Requests.

Date: April 13, 2012
New York, New York

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Paul C. Llewellyn", written over a horizontal line.

Paul C. Llewellyn
KAYE SCHOLER LLP
425 Park Avenue
New York, NY 10022
Telephone: (212) 836-8000

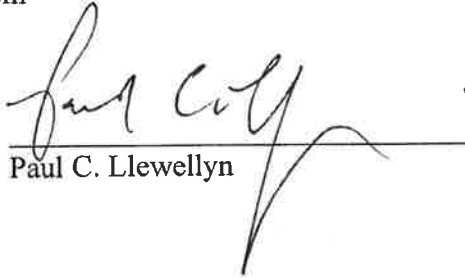
John P. Rynkiewicz
KAYE SCHOLER LLP
The McPherson Building
901 Fifteenth Street, N.W.
Washington, DC , N.Y. 20005
Telephone: (202) 682-3500

Attorneys for Opposers

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused the foregoing OPPOSERS' OBJECTIONS AND RESPONSES TO APPLICANT'S AMENDED FIRST SET OF INTERROGATORIES to be served this 13th day of April, 2012, by U.S. first class mail, postage prepaid, and by electronic mail, upon the following correspondent of record for Applicant:

KENNETH B. WIESEN
36 FARMSTEAD LN
BROOKVILLE, NY 11545-2634
Wiesenlaw@gmail.com



Paul C. Llewellyn

KAYE SCHOLER LLP

Paul C. Llewellyn
212.836.7828
pllewellyn@kayescholer.com
425 Park Avenue
New York, New York 10022-3598
212.836.8000
Fax 212.836.6463
www.kayescholer.com

November 8, 2012

VIA EMAIL (wiesenlaw@gmail.com)

Kenneth Wiesen, Esq.
1 Old Country Road, Suite 360-B
Carle Place, NY 11514

**Re: *Hershey Chocolate & Confectionery Corp., et al. v. Wiesen*
TTAB No. 91200575**

Dear Mr. Wiesen:

We are in receipt of your letter of October 26, 2012 with objections to Hershey Chocolate & Confectionery Corp. and The Hershey Company's (collectively, "Hershey") production of documents and responses to your First Set of Requests for Production of Documents and Things (the "Document Requests") and Amended First Set of Interrogatories (the "Amended Interrogatories").

As a preliminary matter, we note that your so-called "good faith" letter is simply a clone of your July 6, 2012 letter regarding these same issues (attached hereto as Exhibit A), and entirely ignores our July 20, 2012 response thereto (attached hereto as Exhibit B), in which we addressed your objections at length. Thus, your copied-and-pasted October 26, 2012 letter simply ignores our detailed responses to precisely the same issues that you raised three months ago, and hardly constitutes a good-faith effort to resolve the issues that you have raised.

Nevertheless, in the spirit of cooperation and in the interest of moving this proceeding along expeditiously, we again respond to your objections below and, for your further reference, attach our earlier letters addressing the same in detail.

First, as we explained in our July 20, 2012 letter, Hershey has acted in good faith throughout the discovery process. Hershey's objections to your Document Requests and Amended Interrogatories were all valid and appropriate under federal law and the Trademark Trial and Appeal Board ("TTAB") rules of procedure. Subject to these objections, Hershey conducted a diligent search of the documents of sixteen custodians, reviewed thousands documents, and produced responsive documents consistent with its obligations under federal law and TTAB rules. Much of your letter appears to reflect your disappointment that Hershey does not have documents that you would like it to have, rather than any actual deficiency in Hershey's responses or document production.

Second, with respect to your objection to Hershey's responses to Amended Interrogatory Nos. 5, 8, and 9 and Document Request No. 24, as you acknowledge in both your July 6, 2012 and October 26, 2012 letters, the wrappers list the ingredients of each of the products bearing the MILKSHAKE mark. As we explained in our July 20, 2012 letter, to the extent you seek specific and detailed formulations of the flavors used in the MILKSHAKE-branded products, such information is not relevant to the issues in this proceeding: As set forth below, the relevant issue here is the meaning of the term MILKSHAKE to consumers, and there is absolutely no evidence in this proceeding that the technical formulation of Hershey's products has any bearing on consumer understanding. Moreover, such formulations are trade secrets and Hershey is entitled to protect such information against disclosure, particularly to a potential competitor.

To the extent you are seeking evidence of use of the term "milkshake" by Hershey employees, such documents are wholly irrelevant to the dispute at issue here. Notwithstanding the fact that Hershey consistently uses "MILKSHAKE" as a trademark for its candy products, both on the packaging and in advertising, the distinctiveness and protectability of trademarks depends upon consumer perception of the mark, not internal company use thereof. *See, e.g., In re Abcor Development Corp.*, 588 F.2d 811, 814 (C.C.P.A. 1978) ("[D]escriptiveness of a mark, when applied to the goods or services involved, is to be determined from the standpoint of the average prospective purchaser."); *Blisscraft of Hollywood v. United Plastics Co.*, 294 F.2d 694, 699 (2d Cir. 1961) ("In determining whether a claimed trademark is descriptive at the time of its adoption, its meaning to a nonpurchasing segment of the population is not important. The critical question is whether the mark is descriptive to the prospective purchasers of the article."); *Anheuser-Busch Inc. v. Stroh Brewery Co.*, 750 F.2d 631, 638 (8th Cir. 1984) ("The test ... is what consumers, not persons in the trade, understand the term to be.").

Third, with respect to your objection to Hershey's response to Amended Interrogatory No. 6, we also explained in our July 20, 2012 letter that Hershey made a reasonable, good faith effort to collect a list of all recent flavors of Hershey's Kit Kat bars and Whoppers candy. Upon further review, and in an effort to address your concerns, we have conducted further investigation and we hereby supplement the response to Amended Interrogatory No. 6 to include the following additional flavors:

WHOPPERS: Orange Crème Malted Milk Balls, Vanilla Malted Milk Balls and Blueberry Malted Milk Balls.

KIT KAT: Orange & Crème, Chocolate Mocha, Inside Out, Coffee, Mint, Caramel.

At the same time, while we are reasonably certain that this list is complete, Hershey cannot guarantee that the list of flavors provided in response to Interrogatory No. 6 is exhaustive and includes every flavor or variety, including limited edition products, released in the United States since 2005. Furthermore, a list of all flavors of Hershey's Kit Kat bars and Whoppers candy is not relevant to your allegation that Hershey's MILKSHAKE trademark is merely descriptive.

Fourth, you object that Hershey's chart identifying documents responsive to your Amended Interrogatories and Document Requests (which we prepared in response to your request in your letter dated June 4, 2012, attached hereto as Exhibit C), advised "see production generally" with respect to Amended Interrogatory Nos. 16 and 22 and Document Request No. 31. These very broad requests relate generally to Hershey's position that MILKSHAKE is protectable as a trademark.¹ As we again explained in our July 20, 2012 letter, we believe that the response provided in Hershey's chart is appropriate, because it is Hershey's position that the documents it has produced generally support Hershey's position that its MILKSHAKE trademark is protectable and not merely descriptive, and it would be unreasonably burdensome to require Hershey to identify in any greater detail each specific document in its production that it believes supports the broad proposition that the mark is protectable and not merely descriptive. To the extent that you suggest that Hershey should individually list each document in its production, we think that that request would be unreasonable and unduly burdensome. In addition, as we noted in our July 20, 2012 letter, Hershey did provide specific Bates references in response to Amended Interrogatory No. 4² – please see page 4 of the chart attached to our June 7, 2012 letter (attached hereto as Exhibit D).

Fifth, with respect to your objection that Hershey's response to Amended Interrogatory No. 17 "fail[ed] to provide a specific response," we noted in our July 20, 2012 letter that you

¹ Amended Interrogatory No. 16 states "Identify all documents concerning, reflecting or purporting to support any assertion by Hershey that Hershey's mark was not descriptive, was enforceable and/or protected and/or was not used to relate to the consumers the taste, flavor and/or characteristic of the 'various candy products' including, but not limited to the specimen submitted with Opposers' Mark."

Amended Interrogatory No. 22 states "Identify all documents which support Hershey's contention of 'the mark's inherently distinctive nature' as alleged by Opposers in its Notice of opposition paragraph 3."

Document Request No. 31 states "Copies of all documents containing, concerning, reflecting or purporting to support any assertion by Hershey that Hershey's mark was not descriptive, was enforceable and/or protected and/or was not used to relate to the consumers of the product taste, flavor and/or characteristic of the 'various candy products' including, but not limited to the product submitted as a specimen with Opposers' Mark."

² Amended Interrogatory No. 4 states "Separately identify each 'promotion and advertising' for each 'candy product' identified in response to Interrogatory number 3 and all other marketing, sales and product brochures, price lists, supply sheets, sell sheets, marketing catalogs, parts and specification sheets and any other sales and advertising documents which specifically has the term 'MilkShake' contained therein."

acknowledge that Hershey has identified documents responsive to that Amended Interrogatory. Accordingly, we see no basis for this objection.

Sixth, with respect to your objection to Hershey's responses to Amended Interrogatory Nos. 19, 20, and 21, and Document Request Nos. 3, 7, and 26, although Hershey advised that it would produce any documents in its possession that were responsive to those requests, this response was subject to Hershey's General Objection G to Document Requests. General Objection G clearly states that "[a] response that Hershey will produce documents responsive to any individual Document Request does not imply that Hershey has located any responsive documents, but only that Hershey will produce such responsive non-privileged documents as it locates through good faith efforts and reasonable diligence." Hershey conducted a good faith and reasonably diligent search for documents and information responsive to each Document Request and Interrogatory, and did not find any relevant, non-privileged documents responsive to those discovery requests. Again, we explained this in our July 20, 2012 letter, which you entirely ignore.

Seventh, with respect to your objection to Hershey's production in response to Document Request No. 2, as you are aware, and as noted in Bates No. HRSHY00000003, the MILKSHAKE trademark was originally adopted by Hershey's predecessor-in-interest in the 1920s, almost 100 years ago. Given that length of time and the change of ownership, documents concerning the conception, creation, selection, and design of the MILKSHAKE trademark may not have come into Hershey's possession. Hershey conducted a reasonable search of likely custodians and has produced the documents in its possession relevant to this case regarding its MILKSHAKE trademark. Again, this was explained in our July 20, 2012 letter.

Eighth, as we advised in our June 7, 2012 letter and in our July 20, 2012 letter, the documents stamped Bates Nos. 4, 61, and 62 contain information protected by attorney-client privilege and/or attorney work product privilege, hence the redaction for privilege in accordance with federal and TTAB rules. Although we will not produce these privileged documents unredacted, we provided a privilege log for these documents with our July 20, 2012 letter (see Exhibit B), which you simply ignore.

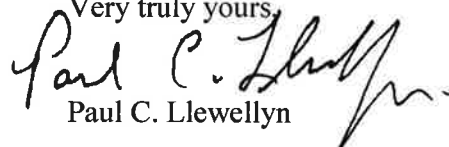
Ninth, with respect to your objection to Hershey's response to Document Request No. 27, Hershey did not "skip" this Document Request. Rather (as, again, our July 20, 2012 letter explained), Hershey referred you to its responses to Document Request Nos. 23 and 25, because Document Request No. 27 is entirely duplicative of those two Document Requests. Likewise, Hershey's responses to Document Request Nos. 39 through 49 stated clear and reasonable objections to those requests and, in the case of Document Request Nos. 39, 42, 44, and 46-48, referred you to Hershey's responses to other Document Requests since they are duplicative of or overlap with those other Document Requests. It is common and standard practice in discovery responses to refer to responses and objections to other discovery requests where such discovery requests are overlapping or duplicative, and we see no basis for your objections in this regard.

Kenneth Wiesen, Esq.

- 5 -

November 8, 2012

As I stated in our previous letters in response to your discovery concerns, we remain willing to confer with you in order to narrow the scope of any dispute. While you did not choose to attempt such a conversation previously, please do not hesitate to contact me if you have any questions or wish to discuss these matters further.

Very truly yours,

Paul C. Llewellyn

Attachments













Fax + 41 21 924-2862
david-harvey.moxon@nestle.com

-----Original Message-----

From: Benjamin, Joe [mailto:JBenjamin@hersheys.com]
Sent: Tuesday, 4. October 2005 02:05
To: Moxon, David-Harvey, VEVEY, B-CCB
Cc: Brown, Martin, VEVEY, B-CCB; De Los Rios, Cesar, VEVEY, B-CCB; Kronmuller, Lisa
Subject: RE: Kit Kat Samples - Limited Editions

David
As usual, appreciate your timely feedback.
Item for Follow-up:

Kit Kat Milkshake -
Firstly, let me correct my wording ... the chocolate is the current Hershey "extra creamy" milk chocolate (crumb based formula), we have used for the recent Kit Kat limited edition.

The malt flavor addition to this , although not one of my personal favorites, is replicating McDonalds Malt Milk shake and our Whoppers flavor. This year, we had several successful products under the Hershey brand that used this flavor as part of an ice cream shop line or Twosomes Limited Edition. It was thought to be a unique flavor, although we didn't pick up any off dairy flavors after we reviewed our split samples, (from the lot we sent you). If you like I can send additional samples from a different sample run? As your aware, fresh samples with flavor additions tend to mellow of time. Our goal is to be in production in November 2005, to tie-in with other Hershey items.

New Opportunities:
Today we have sent out three additional sample sets for your consideration:

1) New size Kit Kat 2F 0.49 ounce samples

Per my email last week with specifics and drawings, these are handmade samples from single plastic moulds to give you an idea of the shape we plan to consolidate to for all 2F at our Hazleton facility. Plans are to target ordering production moulds no later than 7 October, to meet the fast track project timing.

2) Triple Chocolate 2F Eight Pack samples

These are a 2F version with the same formula as the Triple Chocolate miniature and 4F item, (with chocolate praline and cocoa wafers). These are samples produced for our sales team.

3) Extra Crispy Miniatures Assortments, (Standard and Chocolate Lovers) - These are preliminary home use test consumer samples we are fielding on this product with an added layer of praline/wafer versus the current miniatures. Similar approach to the optimization / change of Kit Kat Big Kat to Kit Kat Extra Crispy.

Thanks

Joe Benjamin

Director, Operations Improvement & Support
The Hershey Company, Technical Center / Global Operations Engineering
Phone = (717) 534-6506 Fax = (717) 534-4632
jbenjamin@hersheys.com

The information contained in this transmission is a legally privileged and company confidential communication intended solely for the addressee.

From: Moxon, David-Harvey, VEVEY, B-CCB [mailto:David-Harvey.Moxon@nestle.com]
Sent: Tuesday, September 27, 2005 7:39 AM
To: Benjamin, Joe
Cc: Brown, Martin, VEVEY, B-CCB; De Los Rios, Cesar, VEVEY, B-CCB
Subject: RE: Kit Kat Samples - Limited Editions

Joe,

Today we have tasted the samples you submitted and would comment as follows

Orange & Crème 4F Kit Kat

This was a nice product, good flavour delivery and the samples we received well moulded and packaged

Mocha 4F Kit Kat

This was also well received , good coffe flavour, nice product

Milkshake 4F Kit Kat

This product was not as good as the other two. The malted milk flavour we feel is interesting as a concept but on the samples you submitted we detected an dairy off flavour which lingered after the bar had been eaten.

We would be interested to have your comments on this

Best regards

David

David Moxon
Chocolate, Confectionery & Biscuits Business Unit
Nestlé SA

Telephone + 41 21 924-3847
Fax + 41 21 924-2862
david-harvey.moxon@nestle.com

-----Original Message-----

From: Benjamin, Joe [mailto:JBenjamin@hersheys.com]
Sent: Monday, 26. September 2005 19:35
To: Moxon, David-Harvey, VEVEY, B-CCB
Subject: Kit Kat Samples - Limited Editions

David
Hope all is well.

We shipped to your attention last week three boxes of Limited Editions for your consideration. As usual, Lisa Kronmuller will cover off the proposed graphics on 2006 items through the commercial channels.

* Orange & Crème 4F Kit Kat - this was the final retail product from the recent production. Our original agreement to progress was based on previously submitted sales samples, (plus the single finger miniatures completed earlier this year) . Essentially, a white chocolate Kit Kat with added flavor and color.

* Mocha 4F Kit Kat - These are samples for a 2006 Limited Edition opportunity. This is a slightly different version of this years Coffee Kit Kat. Current milk chocolate with added Mocha flavor.

* Milkshake 4F Kit Kat - These are samples for a 2006 Limited Edition opportunity. Current milk chocolate with added milk shake flavor, (kind of a malted milk flavor common in the states).

Appreciate your thoughts on the above samples.

Kind regards

Joe Benjamin
Director, Operations Improvement & Support
The Hershey Company, Technical Center / Global Operations Engineering
Phone = (717) 534-6506 Fax = (717) 534-4632
jbenjamin@hersheys.com

The information contained in this transmission is a legally privileged and company confidential communication intended solely for the addressee.

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

		x

HERSHEY CHOCOLATE & CONFECTIONERY	:	
CORPORATION and THE HERSHEY COMPANY,	:	
	:	
Opposers,	:	Opposition No. 91200575
	:	
v.	:	Serial Nos.
	:	85/221,585 & 85/210,942
KENNETH B. WIESEN,	:	
	:	
Applicant.	:	
		:
-----		x

**OPPOSERS' FIRST AMENDED OBJECTIONS AND RESPONSES TO APPLICANT'S
FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS**

Opposers Hershey Chocolate & Confectionery Corporation ("HC&CC") and The Hershey Company ("Hershey Company," and, together with HC&CC, "Hershey"), by their attorney, Kaye Scholer LLP, hereby submit this amended response to Applicant Kenneth B. Wiesen's ("Applicant") First Set of Requests for Production of Documents and Things, served on January 24, 2012 ("Document Requests," and each a "Document Request" or "Request"). Hershey reserves the right to supplement these responses in accordance with the Federal Rules of Civil Procedure.

GENERAL OBJECTIONS

Hershey objects generally to the Document Requests set forth below (the "General Objections"). Each of the responses that follows is made subject to the General Objections. Hershey also will assert specific objections to each Document Request as appropriate. To the extent that Hershey responds to Document Requests to which it objects, such objections are not waived and are expressly reserved.

A. Hershey objects to these Document Requests to the extent that they seek documents or information protected by the attorney-client privilege, attorney work product, or any other applicable privilege. The inadvertent disclosure of privileged information or release of privileged documents shall not constitute a waiver of any applicable privilege.

B. Hershey objects to these Document Requests to the extent that they seek confidential research, commercial, customer, or proprietary information or information that Hershey received in confidence and/or is obligated to treat confidentially. Subject to and without waiving said objection, Hershey will produce responsive documents subject to the Trademark Trial and Appeal Board's Standardized Protective Agreement as executed by the parties to this Opposition.

C. Hershey objects to these Document Requests to the extent that they seek the disclosure of documents and/or information not in Hershey's possession, custody, or control.

D. Hershey objects to the Instructions to the extent that they seek to impose obligations beyond those required by the Federal Rules of Civil Procedure, the Code of Federal Regulations, and the Trademark Manual of Board Procedure, or any other applicable rules.

E. Hershey objects to these Document Requests to the extent that they are vague, ambiguous, overbroad, unduly burdensome, unreasonably duplicative, and oppressive, or seek documents that are not reasonably calculated to lead to the discovery of admissible evidence in this action.

F. Hershey objects to these Document Requests to the extent that they seek documents that are publicly available and therefore would impose no greater burden for Applicant to obtain than for Hershey to provide, and/or are already in Applicant's possession.

G. A response that Hershey will produce documents responsive to any individual Document Request does not imply that Hershey has located any responsive documents, but only that Hershey will produce such responsive non-privileged documents as it locates through good faith efforts and reasonable diligence.

H. A response that Hershey will produce documents responsive to any individual Document Request does not constitute an admission that such documents or the information contained therein is relevant or admissible.

I. Hershey's responses and productions will be made according to its best understanding of the terms used in the Document Requests and subject to reasonable inquiry into the relevant facts within the time allowed for responding to the Document Requests.

J. Hershey reserves the right to correct, amend, modify, or supplement its responses from time to time and at any time in the future, as warranted by the circumstances.

K. Hershey objects to these Document Requests to the extent they seek responsive documents concerning Hershey's activities outside the United States because such information is irrelevant, does not relate to commerce in the United States, and is not likely to lead to the discovery of admissible evidence.

L. Hershey objects to these Document Requests to the extent they seek discovery of electronically stored information that is not reasonably accessible because of undue burden or cost.

M. Hershey objects to these Document Requests to the extent they demand a search of all documents in the files of every Hershey employee. Hershey will conduct a search for responsive documents in the files of those reasonably likely to have responsive information.

OBJECTIONS TO DEFINITIONS AND INSTRUCTIONS

Definition K:

The term “candy product” and various candy products” collectively mean all products which Hershey is alleged to have used in connection with the trademark MILKSHAKE as alleged by Hershey in its Notice of Opposition paragraph 2.

Objection to Definition K:

Hershey objects to this definition to the extent it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Hershey will produce responsive documents dated, created, or modified between January 1, 2005 and February 1, 2012.

Definition P:

The term “KitKat” means one of the “candy products” identified by Hershey in its Notice of Opposition paragraph 2 and/or the specimen submitted with Opposers Mark.

Objection to Definition P:

Hershey objects to this definition to the extent it requires the disclosure of documents and/or information not in Hershey’s possession, custody, or control, and to the extent it seeks to impose obligations beyond those required by the Federal Rules of Civil Procedure, the Code of Federal Regulations, or any other applicable rules. Hershey further objects to this definition to the extent it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Hershey will limit its production of responsive documents to KitKat products bearing the MILKSHAKE mark.

Definition Q:

The term “Whoppers” means one of the “candy products” identified by Hershey in its Notice of Opposition paragraph 2 and /or the specimen submitted with Opposers Mark.

Objection to Definition Q:

Hershey objects to this definition to the extent it requires the disclosure of documents and/or information not in Hershey's possession, custody, or control, and to the extent it seeks to impose obligations beyond those required by the Federal Rules of Civil Procedure, the Code of Federal Regulations, or any other applicable rules. Hershey further objects to this definition to the extent it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Hershey will limit its production of responsive documents to Whoppers products bearing the MILKSHAKE mark.

OBJECTIONS TO REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS

Document Request No. 1:

All documents and things identified in response to or requested to be identified in Applicant's First Set of Interrogatories to Opposers.

Response to Document Request No. 1:

Hershey refers to and reincorporates herein its General Objections hereinabove, and its General Objection to Applicant's First Set of Interrogatories (the "Interrogatories"), served on Applicant on February 27, 2012.

Document Request No. 2:

All documents and things concerning the conception, creation, selection, adoption, design, approval, clearance, or use of the Opposers' Mark or any similar mark, including any and all formal or informal trademark searches, trademark search reports, online searches, surveys, polling or other market research, investigations, analyses, opinions, and/or communications between you and any person concerning the Opposers' Mark or any similar mark, and including, without limitation, all such documents created by or otherwise relating to your predecessors-in-interest.

Response to Document Request No. 2:

Hershey objects to the use of the phrase "any similar mark" to the extent it is vague, overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of

admissible evidence. Subject to and without waiver of the foregoing objections and its General Objections, Hershey will produce documents in its possession concerning the conception, creation, selection, adoption, design, approval, clearance, and use of Hershey's MILKSHAKE mark in connection with the uses asserted in Hershey's Notice of Opposition.

Document Request No. 3:

All documents and things setting forth or concerning any change or modification of the Opposers' Mark since the time of conception of Opposers' Mark by Opposers.

Response to Document Request No. 3:

Subject to and without waiver of its General Objections, Hershey will produce documents in its possession setting forth or concerning any change or modification of Hershey's MILKSHAKE mark since its first use asserted in Hershey's Notice of Opposition.

Document Request No. 4:

All documents and things setting forth or concerning any communications between Applicant and the U.S. Patent and Trademark Office and/or the Trademark Trial and Appeal Board concerning the Applicant's Marks and/or Opposers' Mark.

Response to Document Request No. 4:

Subject to and without waiver of its General Objections, Hershey will produce communications in its possession, if any, between Applicant and the U.S. Patent and Trademark Office and/or the Trademark Trial and Appeal Board concerning the Applicant's Marks and/or Hershey's MILKSHAKE mark.

Document Request No. 5:

All documents and things concerning your first use, if any, of the Opposers' Mark whether alone or in conjunction with any other word or mark, in the United States.

Response to Document Request No. 5:

Hershey objects to this Request as overbroad and unduly burdensome. Subject to and without waiver of the foregoing objections and its General Objections, Hershey will produce

documents in its possession sufficient to show Hershey's first use of Hershey's MILKSHAKE mark in the United States asserted in Hershey's Notice of Opposition.

Document Request No. 6:

All documents and things including copies of labels, wrappers, display boxes, other point of sale displays which contain the term MILKSHAKE as contained or used in connection with the "various candy products" identified by Hershey in its response to First Set of Interrogatories #5 and /or in Opposers' Answer paragraph 2.

Response to Document Request No. 6:

Hershey objects to this Request as overbroad and unduly burdensome. Subject to and without waiver of the foregoing objections and its General Objection to the Interrogatories, its Objections to Applicant's Definitions, and its General Objections hereinabove, Hershey will produce representative samples in its possession of labels, wrappers, and boxes bearing Hershey's MILKSHAKE mark.

Document Request No. 7:

All press mentions, reviews, or records of other free coverage you have compiled regarding your use or intended use of the Applicant's Marks (whether alone or in conjunction with any other word or mark).

Response to Document Request No. 7:

Hershey objects to this Request as vague and ambiguous. Subject to and without waiver of the foregoing objections and its General Objections, Hershey will produce responsive documents, if any, compiled by Hershey regarding Applicant's alleged intended use of MILKSHAKE.

Document Request No. 8:

Documents and things sufficient to identify each product and service in connection with which you have used, are using, for Opposers' Mark whether alone or in conjunction with any other word or mark.

Response to Document Request No. 8:

Subject to and without waiver of its General Objections, Hershey will produce documents sufficient to show the product which Hershey has branded with Hershey's MILKSHAKE mark as alleged in Hershey's Notice of Opposition.

Document Request No. 9:

Documents and things sufficient to identify each advertising and marketing channel or medium in which you have used, are using, for Opposers' Mark whether alone or in conjunction with any other word or mark in the United States.

Response to Document Request No. 9:

Subject to and without waiver of its General Objections, Hershey will produce documents sufficient to show the channels through which Hershey uses its MILKSHAKE mark as alleged in the Notice of Opposition.

Document Request No. 10:

Documents and things sufficient to identify the categories or types of purchases of the products and services in connection with which you have used or Opposers' Mark whether alone or in conjunction with any other word or mark.

Response to Document Request No. 10:

Subject to and without waiver of its General Objections, Hershey will produce responsive documents relating to Hershey's use of its MILKSHAKE mark as alleged in Hershey's Notice of Opposition.

Document Request No. 11:

All past, current, advertisements, labels, and other promotional, marketing, or sales materials containing the Opposers' Mark whether alone or in conjunction with any other word or mark, potentially for use in the United States, including, without limitation, all print advertisements, web sites, online or digital advertising, social media presence (*e.g.*, Facebook page, Twitter account, YouTube videos, online gaming, blogs), catalogs, labels, packages, brochures, pamphlets, marketing materials or documents, informational literature, press releases, price lists, stationery, business cards, radio advertisements and scripts therefor, television commercials and scripts and storyboards therefor, and online video or audio materials and scripts therefor.

Response to Document Request No. 11:

Subject to and without waiver of its General Objections, Hershey will produce representative samples of advertising, promotional, marketing, and sales materials in its possession bearing Hershey's MILKSHAKE mark that have been used in the United States since 2005.

Document Request No. 12:

All documents and things concerning or referring to Opposers' Mark.

Response to Document Request No. 12:

Hershey objects to this Document Request as overbroad and unduly burdensome.

Document Request No. 13:

All documents concerning, reflecting, or purporting to support any assertion by Hershey that Hershey's mark is not simply descriptive, nor does the mark on the "various candy products" merely describe the taste, flavor and/or characteristic of the product.

Response to Document Request No. 13:

Hershey objects to this Request as compound, vague, and ambiguous. Subject to and without waiver of its Objections to Definition K and its General Objections, Hershey refers Applicant to Hershey's Responses to Document Request Nos. 2 and 31.

Document Request No. 14:

All documents and things concerning any inquiries or communications from any person concerning or referring to Hershey's Mark.

Response to Document Request No. 14:

Hershey objects to this Request as overbroad and unduly burdensome. Subject to and without waiver of the foregoing objections and its General Objections, Hershey will produce responsive documents, if any, regarding consumer hotline calls referring to Hershey's MILSHAKE mark.

Document Request No. 15:

All documents concerning any inquiries or communications from any person or company in which the term MILKSHAKE is used in the document and in relationship to any of the “various candy products” as identified by Hershey in their Notice of Opposition, paragraph 2.

Response to Document Request No. 15:

Hershey objects to this Request as overbroad and unduly burdensome. Hershey further refers to and reincorporates herein its Objection to Definition K above.

Document Request No. 16:

All documents and things concerning any communications between you and any third party concerning this proceeding or any dispute between Hershey and Applicant relating to use or intended use of the Applicant or Hershey’s Mark anywhere in the world.

Response to Document Request No. 16:

Hershey objects to the term “you” as vague and ambiguous. Subject to and without waiver of its General Objections, Hershey will produce non-privileged communications in its possession between Hershey and any third party regarding this Opposition.

Document Request No. 17:

All documents and things supporting Hershey’s Opposition in this proceeding.

Response to Document Request No. 17:

Hershey objects to this Document Request as overbroad and unduly burdensome. Subject to and without waiver of the foregoing objections and its General Objections, Hershey refers the Applicant to Hershey’s Responses to Document Request Nos. 13 and 31.

Document Request No. 18:

All documents provided to, reviewed by, or prepared for or by any person whom Hershey expects or intends to call as an expert witness at any stage in these proceedings, or on whose testimony (written or oral) Hershey intends to rely on at any stage in this litigation, including, without limitation, all documents such person plans to use, refer to, or rely upon.

Response to Document Request No. 18:

Hershey objects to this Request as premature, overbroad, and an improper use of a discovery device. Hershey will produce disclosures related to any expert witnesses in the manner and at the time required by the applicable rules of discovery.

Document Request No. 19:

Copies of all labels, wrappers, and images of candy boxes and display boxes for all “various candy products” including the specimen submitted with application for Opposers’ Mark from 2000 to present.

Response to Document Request No. 19:

Hershey objects to this Request as duplicative of Document Request No. 6 above. Subject to and without waiver of the foregoing objection, its Objection to Definition K, and its General Objections hereinabove, Hershey refers Applicant to Hershey’s Response to Document Request No. 6 above.

Document Request No. 20:

Copies of all labels, wrappers and images of candy boxes and display boxes of all flavors of the KitKat candy and the Whoppers candy since their first use by Opposers.

Response to Document Request No. 20:

Hershey objects to the use of the phrases “all flavors” and “since their first use” to the extent they are vague and ambiguous, overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Hershey further objects to this Document Request to the extent it is duplicative of Document Request No. 6 above. Subject to and without waiver of the foregoing objections, its Objections to Applicant’s Definitions, and its General Objections, Hershey refers Applicant to Hershey’s Response to Document Request No. 6, and Hershey will produce representative samples of labels, wrappers, and boxes for KitKat

and Whoppers candy products bearing Hershey's MILKSHAKE mark dated, created, or modified between January 1, 2005 and February 1, 2012.

Document Request No. 21:

Copies of all labels, wrappers and images of candy boxes and display boxes of all flavors of the "various candy products" other than the KitKat candy products and the Whopper candy products since their first use by Opposers.

Response to Document Request No. 21:

Hershey objects to the use of the phrases "all flavors" and "since their first use" to the extent they are vague and ambiguous, overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Hershey further objects to this Request to the extent it is duplicative of Document Request No. 6 above. Subject to and without waiver of the foregoing objections, its Objections to Applicant's Definitions, and its General Objections, Hershey refers Applicant to Hershey's Response to Document Request No. 6, and Hershey will produce representative samples of labels, wrappers, and boxes for candy products, other than the KitKat and Whoppers candy products, bearing Hershey's MILKSHAKE mark dated, created, or modified between January 1, 2005 and February 1, 2012.

Document Request No. 22:

Copies of all printed advertisements, brochures, sales documents, catalogues, marketing documents, price lists, supply sheets, sell sheets, pamphlets, parts specification sheets and any other sales or advertising documents to the trade for the "various candy products" including but not limited to KitKat and Whoppers candy products from 2000 to present.

Response to Document Request No. 22:

Hershey objects to the phrases "sales documents" and "sales or advertising documents to the trade" to the extent they are vague and ambiguous. Subject to and without waiver of the foregoing objection, its Objection to Definition K, and its General Objections, Hershey will produce representative samples of sales-related documents, and advertising, marketing, and

manufacturing documents, relating to products bearing Hershey's MILKSHAKE mark since January 1, 2005.

Document Request No. 23:

Copies of all graphic design and art documents for the development or modification of all "various candy products" including Hershey's internal documents and from outside agencies.

Response to Document Request No. 23:

Hershey objects to the use of the phrase "for the development or modification of all 'various candy products'" to the extent it is vague and ambiguous, and further objects that this Request is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiver of the foregoing objections, its Objection to Definition K, and its General Objections, Hershey will produce representative samples of final artwork for labels, wrappers, and boxes bearing Hershey's MILKSHAKE mark since January 1, 2005.

Document Request No. 24:

Copies of all documents listing the flavoring and flavor characteristics and flavor ingredients in the "various candy products" including but not limited to the Whopper and KitKat products.

Response to Document Request No. 24:

Subject to and without waiver of its Objections to Applicant's Definitions and its General Objections, Hershey will produce documents sufficient to show the ingredients of products bearing Hershey's MILKSHAKE mark since January 1, 2005.

Document Request No. 25:

Copies of all documents for the development, testing and modification for the "various candy products" including but not limited to the Whopper and KitKat products.

Response to Document Request No. 25:

Hershey objects to this Request to the extent it is vague and ambiguous, overbroad, and unduly burdensome. Subject to the foregoing objections, its Objections to Applicant's Definitions, and its General Objections, Hershey will produce documents in its possession that discuss the development, testing, and modification of candy products on which Hershey has used its MILKSHAKE mark as asserted in Hershey's Notice of Opposition.

Document Request No. 26:

Copies of all documents which discuss and/or make reference to the strawberry drink graphics and/or art contained on the specimen submitted by Opposers in the application for the mark, including but not limited to art and graphic departments and/or outside agencies and publicity or advertising agencies or departments and any other documents.

Response to Document Request No. 26:

Hershey objects to this Request on the ground that it is vague, ambiguous, overbroad, and unduly burdensome. Subject to the foregoing objections and its General Objections, Hershey refers Applicant to Hershey's Responses to Document Request Nos. 6 and 23, and will produce documents that specifically discuss the "strawberry drink graphics" referred to in this Request.

Document Request No. 27:

Copies of all documents which discuss and/or make reference to focus or sampling groups and testing for the development of the flavors, characteristics and tasting of the various candy products including but not limited to the Whopper and KitKat products.

Response to Document Request No. 27:

Hershey objects to this Request to the extent it is vague and ambiguous, overbroad, and unduly burdensome, and to the extent it is duplicative of Document Request Nos. 23 and 25. Subject to the foregoing objections, its Objections to Applicant's Definitions, and its General Objections, Hershey refers Applicant to Hershey's Responses to Document Request Nos. 23 and 25.

Document Request No. 28:

Copies of all consumer responses, web references, web internet blogs, industry articles, industry reviews, consumer articles, magazine or newspaper references and any other documents which demonstrates, discusses or supports Hershey's claim contained in paragraph 3 of the Notice of Opposition that the "MILKSHAKE trademark has become associated in the minds of the consumer with Hershey products."

Response to Document Request No. 28:

Subject to its General Objections, Hershey will produce documents in its possession that support Hershey's claim in paragraph 3 of Hershey's Notice of Opposition that the "MILKSHAKE trademark has become associated in the minds of the consumer with Hershey products."

Document Request No. 29:

Copies of all documents which are, contain, discuss or make reference to Opposers marketing sales and product brochures, price lists, supply sheets, sell sheets, marketing catalogues, parts and specification sheets and any other sales and advertising documents which specifically has the term "MILKSHAKE" contained therein.

Response to Document Request No. 29:

Hershey objects to this Document Request as overbroad and unduly burdensome, and to the extent it is duplicative of Document Request Nos. 9, 11, and 22. Subject to and without waiver of the foregoing objections and its General Objections, Hershey refers Applicant to Hershey's Responses to Document Request Nos. 9, 11, and 22.

Document Request No. 30:

Copies of all past and current packaging advertisements, labels, and other promotional marketing or sales material containing the Opposers' mark, whether alone or in conjunction with other words or mark, intended for use or potentially for use in the United States, including, without limitations, all print advertisements, web sites, online or digital advertising, social media presence (e.g. Facebook page, Twitter account, YouTube videos, online gaming, blogs), catalogs, labels, packages, brochures, pamphlets, marketing materials or documents, informational literature, press releases, price lists, stationery, business cards, radio advertisements and scripts therefor, television commercials and scripts and storyboards therefor, and online video or audio materials and scripts therefor.

Response to Document Request No. 30:

Hershey objects to this Document Request to the extent it is duplicative of Document Request Nos. 6, 9, 11, 19, 20, and 21, and to the extent it is overbroad and unduly burdensome. Subject to and without waiver of the foregoing objections and its General Objections, Hershey refers Applicant to Hershey's Responses to Document Request Nos. 6, 9, 11, 19, 20, and 21.

Document Request No. 31:

Copies of all documents containing, concerning, reflecting or purporting to support any assertion by Hershey that Hershey's mark was not descriptive, was enforceable and/or protected and/or was not used to relate to the consumers of the product taste, flavor and/or characteristic of the "various candy products" including, but not limited to the product submitted as a specimen with Opposers' Mark.

Response to Document Request No. 31:

Hershey objects to this Document Request to the extent it is vague, ambiguous, overbroad, and unduly burdensome. Subject to and without waiver of the foregoing objections, its Objection to Definition K, and its General Objections, Hershey will produce non-privileged, responsive documents in its possession concerning and supporting Hershey's assertion that Hershey's MILKSHAKE mark is not descriptive and is enforceable.

Document Request No. 32:

Copies of all document which contain information, discussion, and notification about the development of the wrappers, displays, and labels for the "various candy products"

Response to Document Request No. 32:

Hershey objects to this Document Request as overbroad and unduly burdensome. Subject to and without waiver of the foregoing objections, its Objection to Definition K, and its General Objections, Hershey will produce documents in its possession which specifically discuss the development of the labels, wrappers, and boxes for products bearing Hershey's MILKSHAKE mark since January 1, 2005.

Document Request No. 33:

Copies of all documents which contain information, discussion and notification about the benefit or reasoning behind incorporating the term MilkShake on the label, wrappers or displays for the “various candy products” including, but not limited to the specimen product submitted with Opposers’ Mark.

Response to Document Request No. 33:

Hershey objects to this Request as overbroad and unduly burdensome. Subject to and without waiver of the foregoing objections, its Objection to Definition K, and its General Objections, Hershey refers Applicant to Hershey’s Response to Document Request No. 32 above.

Document Request No. 34:

Copies of all documents and things concerning any actual, alleged, potential, or possible instances of confusion, mistake, or deception between Hershey, Hershey’s products or services or Hershey’s Mark, on the part, and the term “MILKSHAKE” used on any third persons food/candy or drink product.

Response to Document Request No. 34:

Subject to and without waiver of its General Objections, Hershey will produce documents in its possession concerning any actual, alleged, potential, or possible instances of confusion, mistake, or deception between products bearing Hershey’s MILKSHAKE mark and any third party product bearing the term “MILKSHAKE.”

Document Request No. 35:

Copies of all documents and things concerning any actual, alleged, potential, or possible instances of confusion, mistake, or deception between Hershey, Hershey’s products or services or Hershey’s Mark, on the one part, and Applicants’ proposed products or services, or the Applicant’s Marks, on the other part.

Response to Document Request No. 35:

Hershey objects to this Document Request on the grounds that Applicant’s products do not yet exist, according to Applicant’s Response to Opposers’ Interrogatory Nos. 5 and 13, and

to the extent this Document Request is duplicative of Document Request No. 34 above. Subject to and without waiver of the foregoing objections and its General Objections, Hershey refers Applicant to Hershey's Response to Document Request No. 34.

Document Request No. 36:

Copies of all documents which identify any "various candy product" as "MilkShake."

Response to Document Request No. 36:

Hershey objects to this Document Request as vague, ambiguous, overbroad, and unduly burdensome. Hershey further refers to and reincorporates herein its Objection to Definition K hereinabove.

Document Request No. 37:

Copies of all Hershey products other than the "various candy products" which Hershey has used the word "MilkShake" on its label or point of sale display since 1991.

Response to Document Request No. 37:

Hershey objects to this Document Request as vague, ambiguous, overbroad, and unduly burdensome.

Document Request No. 38:

Copies of all letters of objection and claims of violations issued by Hershey or its representatives for any instances where Opposers claim any party other than Applicant (Wiesen) has improperly used or intended to improperly use Opposers' Mark.

Response to Document Request No. 38:

Subject to and without waiver of its General Objections, Hershey will produce any letters of objection and claims of violation sent by Hershey or its representatives to any third party that claim improper use of Hershey's MILKSHAKE mark.

Document Request No. 39:

Copies of all documents which are promotional, sales, distribution and advertising of any candy products which contains the term "MILKSHAKE."

Response to Document Request No. 39:

Hershey objects to this Document Request as irrelevant, overbroad, and unduly burdensome, and to the extent it is duplicative of Document Request Nos. 9, 11, and 22. Subject to and without waiver of the foregoing objections and its General Objections, Hershey refers Applicant to Hershey's Responses to Document Request Nos. 9, 11, and 22.

Document Request No. 40:

Copies of all documents which are promotional, sales, distribution, advertising of any drink, food and/or candy product which contains the word "MILKSHAKE" which is other than the "various candy products.

Response to Document Request No. 40:

Hershey objects to this Document Request as irrelevant, vague and ambiguous, overbroad, and unduly burdensome.

Document Request No. 41:

Copies of all labels, wrappers, advertisements, brochures, catalogs, point of sale displays, industry promotions, item lists which depict Hershey products that contain the word "MILKSHAKE" in which Hershey claims **not** to be the use of a trademark but rather a descriptive term for a flavor or characteristic of the item.

Response to Document Request No. 41:

Hershey objects to this Document Request as irrelevant, vague and ambiguous, overbroad, and unduly burdensome.

Document Request No. 42:

Copy of all letters of objection and claims of violations issued by Hershey or its representatives for any instances where Opposers claim any party other than Applicant (Wiesen) has improperly used or intended to improperly use Opposers' Mark.

Response to Document Request No. 42:

Hershey objects to this Document Request as duplicative of Document Request No. 38. Subject to and without waiver of the foregoing objection and its General Objections, Hershey refers Applicant to Hershey's Response to Document Request No. 38.

Document Request No. 43:

Copy of all Hershey products which the word MILKSHAKE is listed on the label, wrapper, display box or point of sale display that is used as a descriptive word to identify a characteristic, taste and/or flavor of the product.

Response to Document Request No. 43:

Hershey objects to this Document Request as vague and ambiguous, overbroad, unduly burdensome, and calling for a legal conclusion.

Document Request No. 44:

Copy of all documents which cover and refer to choosing the wording for the front panel of the wrappers and candy boxes for the various candy products.

Response to Document Request No. 44:

Hershey objects to this Document Request as vague and ambiguous, overbroad, and unduly burdensome, and to the extent it is duplicative of Document Request No. 32. Subject to and without waiver of the foregoing objections and its General Objections, Hershey refers Applicant to Hershey's Response to Document Request No. 32.

Document Request No. 45:

Copy of all documents which cover and refer to the personnel involved in and the Research and Development and formulation of the flavoring and flavor profile & compounding for the "various candy products."

Response to Document Request No. 45:

Hershey objects to this Document Request as vague and ambiguous, overbroad, and unduly burdensome.

Document Request No. 46:

Copy of all documents which cover and refer to the selection and choice of the art work and graphics (including identification of the persons involved) for the front panel of the specimen submitted by Opposers with Opposers' mark application including but not limited to the milkshake drink depicted on the front panel.

Response to Document Request No. 46:

Hershey objects to this Document Request as vague and ambiguous, overbroad, and unduly burdensome, and to the extent it is duplicative of Document Request Nos. 26 and 32.

Subject to and without waiver of the foregoing objections and its General Objections, Hershey refers Applicant to Hershey's Response to Document Request Nos. 26 and 32.

Document Request No. 47:

Copy of all documents which cover and refer to the creation of the art work and graphics (including identification of the persons involved) for the front panel of the specimen submitted by Opposers with Opposers' mark application including but not limited to the milkshake drink depicted on the front panel.

Response to Document Request No. 47:

Hershey objects to this Document Request as vague and ambiguous, overbroad, and unduly burdensome, and to the extent it is duplicative of Document Request Nos. 26 and 32.

Subject to and without waiver of the foregoing objections and its General Objections, Hershey refers Applicant to Hershey's Response to Document Request Nos. 26 and 32.

Document Request No. 48:

Copy of all documents which cover and refer to the advertising (including identification of the persons involved) as set forth by Hershey in Opposers Notice of opposition paragraph 3 which states in part, "in long use, promotion and advertising under Hershey's MILKSHAKE trademark."

- a. Identify each document which discusses such "promotion and advertising".

Response to Document Request No. 48:

Hershey objects to this Document Request as vague and ambiguous, overbroad, and unduly burdensome, and to the extent it is duplicative of Document Request Nos. 9, 11, and 22. Hershey further objects to the phrase "including identification of the persons involved" and to subpart "a" on the grounds that they are not document requests. Subject to and without waiver of the foregoing objections and its General Objections, Hershey refers Applicant to Hershey's Responses to Document Request Nos. 9, 11, and 22.

Document Request No. 49:

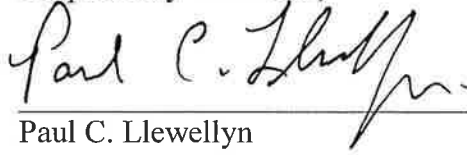
Identify all documents which support Hershey's contention of "the mark's inherently distinctive nature" as alleged by Opposer in its Notice of opposition paragraph 3.

Response to Document Request No. 49:

Hershey objects to this Document Request on the grounds that it is not a document request. Subject to and without waiver of the foregoing objections and its General Objections, Hershey refers Applicant to the documents Hershey has produced and will produce in this Opposition.

Date: March 21, 2012
New York, New York

Respectfully submitted,



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Attorneys for Opposers

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused the foregoing OPPOSERS' FIRST AMENDED OBJECTIONS AND RESPONSES TO APPLICANT'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS to be served this 21st day of March, 2012, by U.S. first class mail, postage prepaid, and by electronic mail, upon the following correspondent of record for Applicant:

KENNETH B. WIESEN
36 FARMSTEAD LN
BROOKVILLE, NY 11545-2634
Wiesenlaw@gmail.com



Paul C. Llewellyn

8/14/12

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

x

HERSHEY CHOCOLATE & CONFECTIONERY
CORPORATION and THE HERSHEY COMPANY,

Opposers,

v.

KENNETH B. WIESEN,

Applicant.

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Opposition No. 91200575

Serial Nos.

85/221,585 & 85/210,942

**OPPOSERS' OBJECTIONS AND RESPONSES TO APPLICANT'S
SECOND SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS**

Opposers Hershey Chocolate & Confectionery Corporation ("HC&CC") and The Hershey Company ("Hershey Company," and, together with HC&CC, "Hershey"), by their attorney, Kaye Scholer LLP, hereby submit this response to Applicant Kenneth B. Wiesen's ("Applicant") Second Set of Requests for Production of Documents and Things, served on July 6, 2012 ("Document Requests," and each a "Document Request" or "Request"). Hershey reserves the right to supplement these responses in accordance with the Federal Rules of Civil Procedure.

GENERAL OBJECTIONS

Hershey objects generally to the Document Requests set forth below (the "General Objections"). Each of the responses that follows is made subject to the General Objections. Hershey also will assert specific objections to each Document Request as appropriate. To the extent that Hershey responds to Document Requests to which it objects, such objections are not waived and are expressly reserved.

A. Hershey objects to these Document Requests to the extent that they seek documents or information protected by the attorney-client privilege, attorney work product, or any other applicable privilege. The inadvertent disclosure of privileged information or release of privileged documents shall not constitute a waiver of any applicable privilege.

B. Hershey objects to these Document Requests to the extent that they seek confidential research, commercial, customer, or proprietary information or information that Hershey received in confidence and/or is obligated to treat confidentially. Subject to and without waiving said objection, Hershey will produce responsive documents subject to the Trademark Trial and Appeal Board's Standardized Protective Agreement as executed by the parties to this Opposition.

C. Hershey objects to these Document Requests to the extent that they seek the disclosure of documents and/or information not in Hershey's possession, custody, or control.

D. Hershey objects to the Instructions to the extent that they seek to impose obligations beyond those required by the Federal Rules of Civil Procedure, the Code of Federal Regulations, and the Trademark Manual of Board Procedure, or any other applicable rules.

E. Hershey objects to these Document Requests to the extent that they are vague, ambiguous, overbroad, unduly burdensome, unreasonably duplicative, and oppressive, or seek documents that are not reasonably calculated to lead to the discovery of admissible evidence in this action.

F. Hershey objects to these Document Requests to the extent that they seek documents that are publicly available and therefore would impose no greater burden for Applicant to obtain than for Hershey to provide, and/or are already in Applicant's possession.

G. A response that Hershey will produce documents responsive to any individual Document Request does not imply that Hershey has located any responsive documents, but only that Hershey will produce such responsive non-privileged documents as it locates through good faith efforts and reasonable diligence.

H. A response that Hershey will produce documents responsive to any individual Document Request does not constitute an admission that such documents or the information contained therein is relevant or admissible.

I. Hershey's responses and productions will be made according to its best understanding of the terms used in the Document Requests and subject to reasonable inquiry into the relevant facts within the time allowed for responding to the Document Requests.

J. Hershey reserves the right to correct, amend, modify, or supplement its responses from time to time and at any time in the future, as warranted by the circumstances.

K. Hershey objects to these Document Requests to the extent they seek responsive documents concerning Hershey's activities outside the United States because such information is irrelevant, does not relate to commerce in the United States, and is not likely to lead to the discovery of admissible evidence.

L. Hershey objects to these Document Requests to the extent they seek discovery of electronically stored information that is not reasonably accessible because of undue burden or cost.

M. Hershey objects to these Document Requests to the extent they demand a search of all documents in the files of every Hershey employee. Hershey will conduct a search for responsive documents in the files of those reasonably likely to have responsive information.

OBJECTIONS TO DEFINITIONS AND INSTRUCTIONS

Definition K:

The term “candy product” and various candy products” collectively mean all products which Hershey is alleged to have used in connection with the trademark MILKSHAKE as alleged by Hershey in its Notice of Opposition paragraph 2.

Objection to Definition K:

Hershey repeats its objection to this definition to the extent it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. As previously noted, Hershey will produce responsive documents dated, created, or modified between January 1, 2005 and February 1, 2012.

Definition P:

The term “KitKat” means one of the “candy products” identified by Hershey in its Notice of Opposition paragraph 2 and/or the specimen submitted with Opposers Mark.

Objection to Definition P:

Hershey again objects to this definition to the extent it requires the disclosure of documents and/or information not in Hershey’s possession, custody, or control, and to the extent it seeks to impose obligations beyond those required by the Federal Rules of Civil Procedure, the Code of Federal Regulations, or any other applicable rules. Hershey further objects to this definition to the extent it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Hershey will limit its production of responsive documents relating to KitKat-branded products to KitKat products bearing the MILKSHAKE mark.

Definition Q:

The term “Whoppers” means one of the “candy products” identified by Hershey in its Notice of Opposition paragraph 2 and /or the specimen submitted with Opposers Mark.

Objection to Definition Q:

Hershey again objects to this definition to the extent it requires the disclosure of documents and/or information not in Hershey's possession, custody, or control, and to the extent it seeks to impose obligations beyond those required by the Federal Rules of Civil Procedure, the Code of Federal Regulations, or any other applicable rules. Hershey further objects to this definition to the extent it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Hershey will limit its production of responsive documents relating to Whoppers-branded products to Whoppers products bearing the MILKSHAKE mark.

OBJECTIONS TO REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS

Document Request No. 1:

All invoices showing all flavor Kit Kat products sold to and/or delivered to and/or invoice to, and/or purchased by MCLANE/NORTHWEST CENTRAL TRADE PAYABLES, Temple, Texas (reference Hershey 0002). State if there are more than twenty-five (25) invoices. Applicant requests the first twenty-five (25) invoices that are closest in date to Hershey 002.

Response to Document Request No. 1:

Hershey objects to this Document Request on the grounds that it is compound, overbroad, and unduly burdensome. Hershey further objects to this Document Request on the grounds that it seeks documents that are not relevant to the claims or defenses of any party or to the subject matter involved in this action, and not reasonably calculated to lead to the discovery of admissible evidence in this action.

Document Request No. 2:

Product labeling and specific identification of the natural and artificial flavoring contained in the Kit Kat Chocolate Milkshake as referenced in Hershey 0525 and 0527.

Response to Document Request No. 2:

Hershey objects to this Document Request on the grounds that it is overbroad and unduly burdensome. To the extent that this Document Request seeks information regarding the specific formulation or recipe of any Hershey candy products, Hershey objects to this Document Request on the grounds that such information is irrelevant and constitutes trade secrets. Hershey further objects to this Document Request to the extent it is duplicative of Document Request Nos. 6, 19, 20, 21, and 24 in Applicant's First Set of Requests for Production of Documents and Things ("Applicant's First Set of Document Requests"). As set forth in its initial responses, Hershey already has produced non-privileged documents in its possession, located by a reasonable search of likely custodians, consistent with its obligations under federal law and Trademark Trial and Appeal Board ("TTAB") rules, that are responsive to Applicant's First Set of Document Requests, including documents showing product labeling for the Kit Kat products bearing the MILKSHAKE mark. Subject to and without waiver of the foregoing objections and its General Objections, Hershey will make available for inspection during regular business hours at Kaye Scholer LLP, 425 Park Avenue, New York, NY 10022, samples of its MILKSHAKE-branded Kit Kat candy bars and Whoppers candy.

Document Request No. 3:

Identify the company and individuals who performed the research and compiled and offered the report, Hershey 0582.

Response to Document Request No. 3:

Hershey objects to this Document Request on the grounds that it is not a document request. Hershey further objects to this purported "Document Request" on the grounds that it is overbroad and unduly burdensome, and it seeks documents that are not relevant to the claims or

defenses of any party or to the subject matter involved in this action, and is not reasonably calculated to lead to the discovery of admissible evidence in this action.

Document Request No. 4:

Documents which depict the graphics that accompanied, were utilized for and/or incorporated in the packaging printing die/schematic, Hershey 0584.

Response to Document Request No. 4:

Hershey objects to this Document Request on the grounds that it is overbroad and unduly burdensome. Hershey further objects to this Document Request on the grounds that it seeks documents that are not relevant to the claims or defenses of any party or to the subject matter involved in this action, and not reasonably calculated to lead to the discovery of admissible evidence in this action. As set forth in its initial responses, Hershey already has produced documents in its possession, located by a reasonable search of likely custodians, consistent with its obligations under federal law and TTAB rules, showing the graphics used on Hershey's MILKSHAKE-branded packaging.

Document Request No. 5:

All documents which evaluate, discuss and/or make reference to the "malt flavor addition" for the Kit Kat Milkshake as referenced in Hershey 0498.

Response to Document Request No. 5:

Hershey objects to this Document Request on the grounds that it is overbroad and unduly burdensome. Hershey further objects to this Document Request on the grounds that it seeks documents that are not relevant to the claims or defenses of any party or to the subject matter involved in this action, and not reasonably calculated to lead to the discovery of admissible evidence in this action. As set forth in its initial responses, Hershey already has produced non-privileged documents in its possession, located by a reasonable search of likely custodians,

consistent with its obligations under federal law and TTAB rules, that discuss the Kit Kat MILKSHAKE-branded candy bars.

Document Request No. 6:

All communications and documents offered by or to Joe Benjamin regarding Milkshake flavoring or products which opposer has claimed bare [sic] the milkshake trademark (see reference Hershey 0498 and 0500). State if there are more than fifty (50) documents. Applicant requests the first fifty (50) documents that are closest in date to Hershey 0498.

Response to Document Request No. 6:

Hershey objects to this Document Request on the grounds that it is vague, ambiguous, overbroad and unduly burdensome. As set forth in its initial responses, Hershey already has produced non-privileged documents in its possession, located by a reasonable search of likely custodians, consistent with its obligations under federal law and TTAB rules, that discuss the Kit Kat MILKSHAKE-branded candy bars.

Document Request No. 7:

All documents authored by, or communications to or from David Moxin [sic] regarding the Milkshake/Malted milk flavor (reference Hershey 0499). State if there are more than fifty (50) documents. Applicant requests the first fifty (50) documents that are closest in date to Hershey 0499.

Response to Document Request No. 7:

Hershey objects to this Document Request on the grounds that it is vague, ambiguous, overbroad, and unduly burdensome. As set forth in its initial responses, Hershey already has produced non-privileged documents in its possession, located by a reasonable search of likely custodians, consistent with its obligations under federal law and TTAB rules, that discuss the Kit Kat MILKSHAKE-branded candy bars. Hershey further objects to this Document Request on the grounds that it seeks the disclosure of documents and/or information that are not in Hershey's possession, custody, or control.

Document Request No. 8:

A complete copy of the Kit Kat concept test, key measure summary report dated May, 2005 (reference Hershey 0501 through 0524).

Response to Document Request No. 8:

Hershey objects to this Document Request on the grounds that it is unduly burdensome and vexatious, in light of the fact that Hershey already produced a complete copy of the document Bates-stamped HRSHY00000501-HRSHY00000524.

Document Request No. 9:

All documents which evaluate, discuss and/or make reference to the findings of the Milkshake concept tested for Kit Kat chocolate milkshake discussed and referenced in the Kit Kat concept test key measure summary report May, 2005 (Hershey 0501 through 0524). State if there are more than fifty (50) documents. Applicant requests the first fifty (50) documents that are closest in date to Hershey 0501.

Response to Document Request No. 9:

Hershey objects to this Document Request on the grounds that it is vague, ambiguous, compound, overbroad, and unduly burdensome. Hershey further objects to this Document Request on the grounds that it seeks documents that are not relevant to the claims or defenses of any party or to the subject matter involved in this action, and not reasonably calculated to lead to the discovery of admissible evidence in this action. Hershey further objects to this Document Request to the extent it seeks information and documents that are duplicative of information and documents sought in Applicant's First Set of Document Requests. As set forth in its initial responses, Hershey already has produced non-privileged documents in its possession, located by a reasonable search of likely custodians, consistent with its obligations under federal law and TTAB rules, that are responsive to Applicant's First Set of Document Requests.

Document Request No. 10:

All documents which evaluate, discuss and/or make reference to the Milkshake, vanilla milkshake, orange cream milkshake flavors or products which opposer claims bare [sic] the mark milkshake as referenced in the Whoppers Six cell key measures report (Hershey 0566 through

Hershey 0582). State if there are more than fifty (50) documents. Applicant requests the first fifty (50) documents that are closest in date to Hershey 0566.

Response to Document Request No. 10:

Hershey objects to this Document Request on the grounds that it is vague, ambiguous, compound, overbroad, and unduly burdensome. Hershey further objects to this Document Request on the grounds that it seeks documents that are not relevant to the claims or defenses of any party or to the subject matter involved in this action, and not reasonably calculated to lead to the discovery of admissible evidence in this action. Hershey further objects to this Document Request to the extent it seeks information and documents that are duplicative of information and documents sought in Applicant's First Set of Document Requests. As set forth in its initial responses, Hershey already has produced non-privileged documents in its possession, located by a reasonable search of likely custodians, consistent with its obligations under federal law and TTAB rules, that are responsive to Applicant's First Set of Document Requests.

Document Request No. 11:

Complete copy of the Whoppers Six cell key measure report (Hershey 0566 through 0582).

Response to Document Request No. 11:

Hershey objects to this Document Request on the grounds that it is unduly burdensome and vexatious, in light of the fact that Hershey already produced a complete copy of the document Bates-stamped HRSHY00000566-HRSHY00000582.

Document Request No. 12:

Documents which identify the author of Hershey 0628.

Response to Document Request No. 12:

Hershey objects to this Document Request on the grounds that it is overbroad, unduly burdensome. Hershey further objects to this Document Request on the grounds that it seeks

documents that are not relevant to the claims or defenses of any party or to the subject matter involved in this action, and not reasonably calculated to lead to the discovery of admissible evidence in this action.

Document Request No. 13:

All documents which evaluate, discuss and/or make reference to the consideration and/or concept testing of the flavors vanilla milkshake and orange creme milkshake as referenced in Hershey 0628. State if there are more than fifty (50) documents. Applicant requests the first fifty (50) documents that are closest in date to Hershey 0628.

Response to Document Request No. 13:

Hershey objects to this Document Request on the grounds that it is vague, ambiguous, compound, overbroad, and unduly burdensome. Hershey further objects to this Document Request on the grounds that it seeks documents that are not relevant to the claims or defenses of any party or to the subject matter involved in this action, and not reasonably calculated to lead to the discovery of admissible evidence in this action. Hershey further objects to this Document Request to the extent it seeks information and documents that are duplicative of information and documents sought in Applicant's First Set of Document Requests. As set forth in its initial responses, Hershey already has produced non-privileged documents in its possession, located by a reasonable search of likely custodians, consistent with its obligations under federal law and TTAB rules, that are responsive to Applicant's First Set of Document Requests.

Document Request No. 14:

All documents which evaluate, discuss and/or make reference to the graphic design of the Whoppers wrapper Hershey 0636. State if there are more than fifty (50) documents. Applicant requests the first fifty (50) documents that are closest in date to Hershey 0636.

Response to Document Request No. 14:

Hershey objects to this Document Request on the grounds that it is overbroad and unduly burdensome. Hershey further objects to this Document Request to the extent it seeks

information or documents that are duplicative of information and documents sought in Applicant's First Set of Document Requests. As set forth in its initial responses, Hershey already has produced non-privileged documents in its possession, located by a reasonable search of likely custodians, consistent with its obligations under federal law and TTAB rules, that are responsive to Applicant's First Set of Document Requests.

Document Request No. 15:

Complete document of Kit Kat LE's purchase intent (Hershey 0637 through 0668).

Response to Document Request No. 15:

Hershey objects to this Document Request on the grounds that it is unduly burdensome and vexatious, in light of the fact that Hershey already produced a complete copy of the document Bates-stamped HRSHY00000637-HRSHY00000668.

Document Request No. 16:

All documents which evaluate, discuss and/or make reference to the findings and to the flavor evaluations, including Milkshake (as referenced in Hershey 0647). State if there are more than fifty (50) documents. Applicant requests the first fifty (50) documents that are closest in date to Hershey 0647.

Response to Document Request No. 16:

Hershey objects to this Document Request on the grounds that it is vague, ambiguous, compound, overbroad, and unduly burdensome. Hershey further objects to this Document Request to the extent it seeks information or documents that are duplicative of information and documents sought in Applicant's First Set of Document Requests. As set forth in its initial responses, Hershey already has produced non-privileged documents in its possession, located by a reasonable search of likely custodians, consistent with its obligations under federal law and TTAB rules, that are responsive to Applicant's First Set of Document Requests.

Document Request No. 17:

Provide a copy of all documents which contain communications from or to any of the authors or recipients of documents 477 through 489 and 497 which discuss, evaluate or refer to milkshake or milkshake graphics. State if there are more than fifty (50) documents. Applicant requests the first fifty (50) documents that are closest in date to Hershey 477.

Response to Document Request No. 17:

Hershey objects to this Document Request on the grounds that it is vague, ambiguous, compound, overbroad, and unduly burdensome. Hershey further objects to this Document Request to the extent it seeks information or documents that are duplicative of information and documents sought in Applicant's First Set of Document Requests. As set forth in its initial responses, Hershey already has produced non-privileged documents in its possession, located by a reasonable search of likely custodians, consistent with its obligations under federal law and TTAB rules, that are responsive to Applicant's First Set of Document Requests.

Document Request No. 18:

Provide copies of attachments for document 491.

Response to Document Request No. 18:

Subject to and without waiver of its General Objections, Hershey will produce the attachments for the document Bates-stamped HRSHY00000491.

Document Request No. 19:

Provide better quality copies of documents 557 and 559.

Response to Document Request No. 19:

Hershey objects to this Document Request on the grounds that it is unduly burdensome. Hershey produced the documents Bates-stamped HRSHY00000557 and HRSHY00000559 as collected from Hershey's files.

Document Request No. 20:

Provide the summary of comments as referred to in document 549.

Response to Document Request No. 20:

Subject to and without waiver of its General Objections, Hershey will produce the summary of comments referenced in the document Bates-stamped HRSHY00000549.

Document Request No. 21:

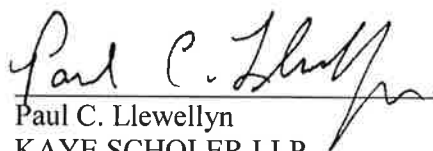
Provide copies of all communications, graphics and documents from and to American Color Packaging which discuss, evaluate or make reference to the terms and graphics "*KitKat Milkshake*," "*Whoppers Milkshake vanilla*," "*Whoppers Milkshake orange creme*," "*Whoppers Milkshake strawberry*," "*Whoppers Robin Eggs Milkshake strawberry*." State if there are more than fifty (50) documents. Applicant requests the first fifty (50) documents that are closest in date to October 2012.

Response to Document Request No. 21:

Hershey objects to this Document Request on the grounds that it is vague, ambiguous, compound, overbroad, and unduly burdensome. Hershey further objects to this Document Request to the extent it seeks information or documents that are duplicative of information and documents sought in Applicant's First Set of Document Requests. As set forth in its initial responses, Hershey already has produced non-privileged documents in its possession, located by a reasonable search of likely custodians, consistent with its obligations under federal law and TTAB rules, that are responsive to Applicant's First Set of Document Requests.

Date: August 9, 2012
New York, New York

Respectfully submitted,



Paul C. Llewellyn
KAYE SCHOLER LLP
425 Park Avenue
New York, NY 10022
Telephone: (212) 836-8000

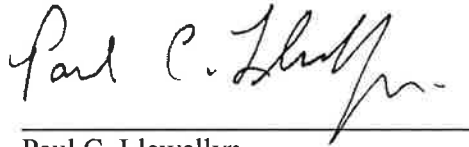
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The McPherson Building
901 Fifteenth Street, N.W.
Washington, DC , N.Y. 20005
Telephone: (202) 682-3500

Attorneys for Opposers

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused the foregoing OPPOSERS' OBJECTIONS AND RESPONSES TO APPLICANT'S SECOND SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS to be served this 9th day of August, 2012, by U.S. first class mail, postage prepaid, and by electronic mail, upon the following correspondent of record for Applicant:

KENNETH B. WIESEN
1 OLD COUNTRY ROAD, SUITE 360-B
CARLE PLACE, NY 11514
Wiesenlaw@gmail.com



Paul C. Llewellyn

From: Loser, Deborah
Sent: Monday, June 13, 2005 11:24 AM
To: Stamm, Melinda; Houston, J. Matthew; Kronmuller, Lisa
Subject: FW: Material Request - LE Kit Kat Chocolate Milkshake
Can we use this or do I need to make it official; get this in PFS and ask Chris Rank to issue the label?

We are running sales samples for MILKSHAKE 6/25/05 at the REESE plant.

Deb

From: Kronmuller, Lisa
Sent: Wednesday, May 18, 2005 3:32 PM
To: Loser, Deborah
Subject: RE: Material Request - LE Kit Kat Chocolate Milkshake

Thanks so much for the quick turnaround on this, Deb!

From: Loser, Deborah
Sent: Wednesday, May 18, 2005 1:32 PM
To: Houston, J. Matthew; Eckert, Donna; Kinderwater, Craig; Kronmuller, Lisa
Cc: Stamm, Melinda; 'Lee Millard'; 'jparkes@printpack.com'; Rank, Christine
Subject: RE: Material Request - LE Kit Kat Chocolate Milkshake

Here is the ingredient statement:

KIT KAT CHOCOLATE MILKSHAKE

INGREDIENTS: SUGAR; MILK; COCOA BUTTER; WHEAT FLOUR; CHOCOLATE; REFINED PALM KERNEL OIL; CONTAINS 2% OR LESS OF: NONFAT MILK, NATURAL & ARTIFICIAL FLAVORING; SOY LECITHIN; PGPR (EMULSIFIER); YEAST; VANILLIN, ARTIFICIAL FLAVOR; SALT; AND SODIUM BICARBONATE.

ALLERGY INFORMATION: MANUFACTURED IN A FACILITY THAT PROCESSES PEANUTS.

Chris, if you see any issues - please reply. This is basically the extra creamy label with an N&A flavor added.

Call with any questions...Thanks.
Deb

From: Houston, J. Matthew
Sent: Wednesday, May 18, 2005 10:19 AM
To: Eckert, Donna; Loser, Deborah; Kinderwater, Craig; Kronmuller, Lisa
Cc: Stamm, Melinda; 'Lee Millard'; 'jparkes@printpack.com'; Rank, Christine
Subject: RE: Material Request - LE Kit Kat Chocolate Milkshake

If that is the case the information on the attached Material Request form is not accurate. "Delivery Date 6/10/05", either way we need to move on this quickly.

<< File: Material Request Form -KK LE labels.xls >>

From: Loser, Deborah
Sent: Wednesday, May 18, 2005 1:32 PM
To: Houston, J. Matthew; Eckert, Donna; Kinderwater, Craig; Kronmuller, Lisa
Cc: Stamm, Melinda; 'Lee Millard'; 'jparkes@printpack.com'; Rank, Christine
Subject: RE: Material Request - LE Kit Kat Chocolate Milkshake

Here is the ingredient statement:

KIT KAT CHOCOLATE MILKSHAKE

INGREDIENTS: SUGAR; MILK; COCOA BUTTER; WHEAT FLOUR; CHOCOLATE; REFINED PALM KERNEL OIL; CONTAINS 2% OR LESS OF: NONFAT MILK, NATURAL & ARTIFICIAL FLAVORING; SOY LECITHIN; PGPR (EMULSIFIER); YEAST; VANILLIN, ARTIFICIAL FLAVOR; SALT; AND SODIUM BICARBONATE.

ALLERGY INFORMATION: MANUFACTURED IN A FACILITY THAT PROCESSES PEANUTS.

Chris, if you see any issues - please reply. This is basically the extra creamy label with an N&A flavor added.

Call with any questions...Thanks.
Deb

From: Houston, J. Matthew
Sent: Wednesday, May 18, 2005 10:19 AM
To: Eckert, Donna; Loser, Deborah; Kinderwater, Craig; Kronmuller, Lisa
Cc: Stamm, Melinda; 'Lee Millard'; 'jparkes@printpack.com'; Rank, Christine
Subject: RE: Material Request - LE Kit Kat Chocolate Milkshake

If that is the case the information on the attached Material Request form is not accurate. "Delivery Date 6/10/05", either way we need to move on this quickly.

<< File: Material Request Form -KK LE labels.xls >>

From: Eckert, Donna
Sent: Wednesday, May 18, 2005 10:05 AM
To: Houston, J. Matthew; Loser, Deborah; Kinderwater, Craig; Kronmuller, Lisa
Cc: Stamm, Melinda; 'Lee Millard'; 'jparkes@printpack.com'; Rank, Christine
Subject: RE: Material Request - LE Kit Kat Chocolate Milkshake

Matt,

It is my understanding that the requested delivery date of this material to the plant is 6/6, which was a revision to the original material request form issued. I thought the production date was 6/10. Thank you.
Donna

From: Houston, J. Matthew
Sent: Wednesday, May 18, 2005 9:20 AM
To: Loser, Deborah; Kinderwater, Craig; Kronmuller, Lisa
Cc: Eckert, Donna; Stamm, Melinda; 'Lee Millard'; 'jparkes@printpack.com'; Rank, Christine
Subject: Material Request - LE Kit Kat Chocolate Milkshake
Importance: High

Group,

I am still waiting for the ingredient copy to produce 90,000 Sales Sample labels for Kit Kat LE Chocolate